

No. 12845

cc
V. 2687

United States
Court of Appeals
for the Ninth Circuit.

THE STUART COMPANY, a Corporation,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.

THE STUART COMPANY, a Corporation,
Respondent.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 400)

FILED

MAY 7 1951

PAUL H. THOMAS

Petition to Review a Decision of the Tax Court
of the United States

No. 12845

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Court of Appeals
for the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner :

A. CALDER MACKAY, ESQ.,
ARTHUR McGREGOR, ESQ.,
HOWARD W. REYNOLDS, ESQ.,
F. EDWARD LITTLE, ESQ.,
ROBERT H. DUNLAP, ESQ.

For Respondent :

R. E. MAIDEN, ESQ.

The Tax Court of the United States

Docket No. 12473

THE STUART COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

DOCKET ENTRIES

1946

Nov. 12—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 18—Copy of petition served on General Counsel.

Dec. 31—Answer filed by General Counsel.

Dec. 31—Request for hearing at Los Angeles, California.

1947

Jan. 3—Notice issued placing proceeding on Los Angeles, Calif., calendar.

Service of answer and request made.

Dec. 8—Hearing set 1/26/48—Los Angeles, California.

1948

Jan. 28,

29, 30,

& 31—Hearing had before Judge Harron on merits. Motion of petitioner to amend petition—Granted. Amended answer filed by respondent. Appearance of Robert H. Dunlap, as counsel, filed. Petitioner's brief 3/16/48.

Respondent's brief 4/16/48. Petitioner's reply brief 5/17/48.

Feb. 20—Transcript of hearing 1/28/48 filed.

Feb. 20—Transcript of hearing 1/29/48 filed.

Feb. 20—Transcript of hearing 1/30/48 filed.

Feb. 26—Transcript of hearing 1/31/48 filed.

Mar. 10—Answer to amendment to petition filed by General Counsel. 3/11/48 Served.

Mar. 16—Brief filed by taxpayer. 3/17/48 Copy served.

Apr. 16—Reply brief filed by General Counsel.

May 5—Motion to correct error in respondent's reply brief, filed by General Counsel. 5/5/48 Granted.

May 17—Reply brief filed by taxpayer. 5/18/48 Copy served.

1950

June 30—Memorandum findings of fact and opinion rendered, Judge Harron.

Decision will be entered under rule 50. Copy served.

1950

Aug. 22—Respondent's computation filed.

Aug. 25—Hearing set 9/27/50 on settlement.

Sept. 21—Consent to respondent's computation filed.

Sept. 22—Decision entered. Judge Harron. Div. 13.

Dec. 21—Petition for review by U. S. Court of Appeals for the Ninth Circuit filed by taxpayer.

Dec. 22—Proof of service filed.

Dec. 21—Designation of contents of record on review filed by taxpayer with proof of service acknowledged thereon as of 12/22/50.

Dec. 21—Petition for review by U. S. Court of Appeals for the Ninth Circuit filed by General Counsel.

Dec. 28—Proof of service of petition for review sent to taxpayer filed.

Dec. 28—Proof of service of petition for review sent to counsel for taxpayer filed.

1951

Jan. 8—Statement of points filed by General Counsel with statement of service by mail thereon.

Jan. 8—Statement of Non-Diminution of Record filed by General Counsel with statement of service thereon.

1951

Jan. 15—Statement of points and designation of parts of the record to be printed filed by taxpayer with acknowledgment of service thereon.

Jan. 15—Further designation of contents of record on review filed by taxpayer with acknowledgment of service thereon.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols LA:IT:90D:PAK), dated August 16, 1946, and as a basis of this proceeding alleges as follows:

1. The petitioner is a corporation with its principal office at 234 East Colorado Street, Pasadena 1, California. The returns for the periods here involved were filed with the Collector for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on or about August 16, 1946.

3. The taxes in controversy are income taxes, declared value excess-profits taxes and excess-profits taxes for the following years and in the following amounts:

Year Ended	Income Taxes	Declared Value	Excess-Profits Taxes
		Excess-Profits Taxes	
March 31, 1943.....	\$1,733.81	\$ 263.70	\$ 8,495.95
March 31, 1944.....	—	—	52,808.66
March 31, 1945.....	287.13	6,591.80	67,286.82

4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

(a) The respondent erred in disallowing as deductions for the taxable years ended March 31, 1943; March 31, 1944, and March 31, 1945, royalties paid in the respective amounts of \$17,485.32, \$57,-189.47 and \$94,637.96.

(b) The respondent erred in determining that said royalty payments were capital expenditures.

(c) If the Court should find that the above-referred to payments are not in the nature of royalties, then the respondent erred in disallowing said payments as deductions in the years indicated for the reason that said payments were made solely for the cancellation of an onerous contract.

(d) The respondent erred in disallowing as a deduction for the taxable year ended March 31, 1943, the entire lump sum payment made during that year of \$35,000.00 under the agreement of cancellation of the above-referred-to contract.

(e) The respondent erred in failing to allow as a deduction from income the sum of \$2,023.81, interest paid by petitioner during the taxable year ended March 31, 1943.

(f) The respondent erred in failing to allow as

a deduction from income for the taxable year ended March 31, 1943, the sum of \$5,286.83 as a net operating loss carryover.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner is a corporation organized and existing under and by virtue of the laws of the State of California. Petitioner is now and since the date of its incorporation on or about March 27, 1941, has been engaged in the sale and distribution of vitamin food concentrates, with its principal office at 234 East Colorado Street, Pasadena 1, California.

(b) On or about May 5, 1941, petitioner, The Vita-Food Corporation and Shaler Food Products Company entered into an agreement under the terms of which The Vita-Food Corporation was to manufacture and petitioner was to sell and distribute certain vitamin food concentrates to be known as "The Stuart Formula."

(c) Operations under the above-referred-to contract were never satisfactory or profitable to the petitioner for many reasons. Chiefly, the pricing arrangement did not permit petitioner to make a profit and the product which The Vita-Food Corporation supplied was inferior and undependable in quality. As a result, disputes arose and on or about November 28, 1942, petitioner and The Vita-Food Corporation entered into Agreement of Settlement of Litigation and Cancellation of Contract.

(d) Under the above-referred to agreement of

cancellation of contract, petitioner agreed to pay The Vita-Food Corporation, and did pay as indicated upon its returns for the years here in question, the sums of \$35,000.00 upon execution of the agreement, \$40,000.00 at the rate of \$4,000.00 per month and \$122,700.00, payable as royalties based upon units of vitamin concentrates sold.

(e) Petitioner did not make any part of said payments for the purpose of acquiring a capital asset, but did make all of said payments as royalties and/or for the cancellation of an onerous contract. Notwithstanding this fact, the respondent has erroneously and illegally determined that all of said payments were capital expenditures made for the acquisition of a capital asset.

(f) Petitioner is informed and believes and upon such information and belief alleges that if it was not at all times the owner of the trade name "The Stuart Formula," that registration of such trade-mark was cancellable upon petition to the United States Patent Office by petitioner. Notwithstanding this fact, the respondent has erroneously and illegally determined that the above-referred-to payments were made for the purpose of acquiring exclusive right to the use of said trade name.

(g) Petitioner is informed and believes, and upon such information and belief alleges, that the name "The Stuart Formula" was without value at the time the above-referred-to agreement of cancellation of contract was entered into. Notwithstanding

this fact, the respondent has erroneously and illegally determined that all the payments made by petitioner under said agreement of cancellation of contract were made for the purpose of acquiring exclusive right to the use of said trade name.

(h) Under dates of September 12, 1942; September 23, 1942, and September 30, 1942, petitioner made payments of interest totaling \$2,023.81 upon notes of Shaler Food Products Company, which petitioner assumed as a result of a merger between petitioner and the Shaler Food Products Company on or about July 3, 1942. Notwithstanding this fact, the respondent has erroneously and illegally failed to allow said interest payments as a deduction for the taxable year ended March 31, 1943.

(i) As a result of and in connection with the above-referred-to merger of the Shalter Food Products Company and petitioner, petitioner became entitled to the net operating loss of the Shaler Food Products Company in the amount of \$5,286.83. Notwithstanding this fact, the respondent has erroneously and illegally failed to allow said net operating loss as a deduction for the taxable year ended March 31, 1943, in accordance with the provisions of Section 122 of the Internal Revenue Code.

Wherefore, petitioner prays that The Tax Court of the United States hear this proceeding and re-determine the aforesaid deficiency, in accordance with the rights of the petitioners in the premises; that overpayment be determined by reason of additional deductions allowable as alleged herein, the amount of which may be determined under Rule 50;

and grant such other and further relief, including refunds, as to it may seem just and proper.

/s/ A. CALDER MACKAY,
/s/ ARTHUR McGREGOR,
/s/ HOWARD W. REYNOLDS,
/s/ F. EDWARD LITTLE,
Counsel for Petitioner.

Of Counsel:

/s/ ROBERT H. DUNLAP.

State of California,
County of Los Angeles—ss.

Arthur Hanisch and Ludwig Lauerhass, being duly sworn, depose and say: That they are President and Assistant Treasurer, respectively, of The Stuart Company, the petitioner named in the foregoing Petition; that they are duly authorized to verify the same; that they have read the said Petition and know the contents thereof; that the same is true of their own knowledge, except as to these matters which are therein stated on information or belief, and as to those matters they believe it to be true.

/s/ ARTHUR HANISCH,
/s/ LUDWIG LAUERHASS.

Subscribed and sworn to before me this 7th day of November, 1946.

[Seal] /s/ MARJORIE M. McADAM,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires Aug. 18, 1947.

EXHIBIT A

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

August 16, 1946

Office of
Internal Revenue Agent
in Charge
Los Angeles Division
LA:IT:90D:PAK
The Stuart Company
234 East Colorado Street
Pasadena 1, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable years ended March 31, 1943, 1944 and 1945, discloses a deficiency of \$2,020.94 for the taxable years ended March 31, 1943, and March 31, 1945, and an overassessment of \$142.15 for the taxable year ended March 31, 1944, and that the determination of your declared value excess-profits tax liability for the taxable years ended March 31, 1943, and 1945, discloses a deficiency of \$6,855.50, and that the determination of your excess profits tax liability for the taxable years ended March 31, 1943, 1944 and 1945, discloses a deficiency of \$128,591.43, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner.

By GEORGE D. MARTIN,

Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of Waiver

Form 843

Statement

LA:IT:90D:PAK

The Stuart Company
234 East Colorado Street
Pasadena 1, California

Tax Liability for the Taxable Years
Ended March 31, 1943, to 1945, Inclusive
Income Tax

Year Ended	Liability	Assessed	Over-assessment	Deficiency
March 31, 1943.....	\$ 1,733.81	\$ 0.00	—	\$ 1,733.81
March 31, 1944.....	1,847.66	1,989.81	\$142.15	—
March 31, 1945.....	2,859.52	2,572.39	—	287.13
Totals.....	\$ 6,440.99	\$4,562.20	\$142.15	\$ 2,020.94
Declared Value Excess-Profits Tax				
March 31, 1943.....	\$ 263.70	\$ 0.00	—	\$ 263.70
March 31, 1945.....	6,591.80	0.00	—	6,591.80
Totals.....	\$ 6,855.50	\$ 0.00		\$ 6,855.50
Excess-Profits Tax				
March 31, 1943.....	\$ 8,495.95	\$ 0.00	—	\$ 8,495.95
March 31, 1944.....	52,808.66	0.00	—	52,808.66
March 31, 1945.....	73,635.63	6,348.81	—	67,286.82
Totals.....	\$134,940.24	\$6,348.81		\$128,591.43

In making this determination of your tax liability careful consideration has been given to the reports of examination dated November 16, 1945, and June 5, 1946.

In your returns for the taxable years ended March 31, 1943, March 31, 1944, and March 31, 1945, there are claimed deductions for royalties in the respective amounts of \$17,485.32, \$57,189.47 and \$94,637.96. The claimed deductions are disallowed because they represent capital expenditures.

For the taxable year ended March 31, 1943, and prior taxable years you claimed deductions for bad debts on the basis of specific bad debts. For the taxable years ended March 31, 1944, and March 31, 1945, you claimed deductions for additions to reserve for bad debts. Since you did not secure permission from the Commissioner to change the method of accounting for bad debts for the taxable years ended March 31, 1944, and March 31, 1945, the deductions claimed for addition to reserve for bad debts for those years are disallowed and, in lieu thereof, deductions are allowed for debts which became worthless and were charged to the reserve for bad debts.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 322(a) of the Internal Revenue Code, provided that you fully protect yourself against the running of the statute of limitations with respect

to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue for your district, a claim for refund on form 843, a copy of which is enclosed, the basis of which may be as set forth herein.

ADJUSTMENT TO NET INCOME

Taxable Year Ended March 31, 1943

Net income as disclosed by return (loss).....	\$(962.80)
Unallowable deduction:	
(a) Deduction for royalties disallowed.....	17,458.32
Net income adjusted.....	\$16,495.52

EXPLANATION OF ADJUSTMENT

(a) This adjustment has been previously explained.

COMPUTATION OF DECLARED VALUE EXCESS-PROFITS TAX

Taxable Year Ended March 31, 1943

Net income adjusted.....	\$16,495.52
Less: 10% of \$125,000.00 value of capital stock as declared in capital stock tax return for the year ended June 30, 1942.....	12,500.00
Net income subject to declared value excess-profits tax.....	\$ 3,995.52
Declared value excess-profits tax:	
6.6% of \$3,995.52.....	\$ 263.70
Correct declared value excess profits tax liability.....	\$ 263.70
Declared value excess-profits tax assessed:	
Original, account No. N.C. 16249.....	\$ 0.00
Deficiency of declared value excess-profits tax.....	\$ 263.70

Excess-Profits Net Income

Taxable Year Ended March 31, 1943

Inasmuch as you did not file a corporation excess-profits tax return for this taxable year your excess profits net income has been determined as follows:

Net income adjusted.....	\$16,495.52
Addition:	
(a) 50% of interest on borrowed capital \$3,177.21	
(b) Adjustment of net operating loss deduction.....	1,496.71
Total.....	\$21,169.44
Reduction:	
(c) Declared value excess-profits tax.....	263.70
Excess-profits net income determined.....	\$20,905.74

EXPLANATION OF ADJUSTMENTS

(a) The deduction claimed for interest is reduced by 50% of the interest on borrowed capital, in accordance with section 711 (a) (2) (B) of the Internal Revenue Code.

(b) The net operating loss deduction of \$6,462.14, representing a net operating loss carryover from the taxable year ended March 31, 1942, and claimed as a deduction in computing net income on your return is decreased by \$1,496.71 representing 50% of interest on borrowed capital for that taxable year, in accordance with section 711 (a) (2) (1) of the Internal Revenue Code.

(c) A deduction is allowed for declared value excess-profits tax in the amount of \$263.70.

INVESTED CAPITAL

Taxable Year Ended March 31, 1943

Since no corporation excess-profits tax return was filed for this year your invested capital is determined as shown in the following:

(a) Equity invested capital.....	\$ 2,188.35
(b) Average borrowed invested capital.....	42,737.27

Invested capital determined.....	\$44,925.62
----------------------------------	-------------

(a) The amount of equity invested capital \$2,188.35, is determined as shown in the following:

Money paid in for stock.....	\$ 1,000.00
Property paid in for stock during year.....	\$1,000.00
Average daily amount (\$1,000.00x274/365).....	750.68

Total.....	\$ 1,750.68
25% of new capital.....	437.67

Equity invested capital determined.....	\$ 2,188.35
---	-------------

(b) It has been determined that you had average borrowed capital of \$85,474.53 for this year, of which 50 per centum, or \$42,737.27, is includible in invested capital in accordance with section 719 (b) of the Internal Revenue Code.

COMPUTATION OF UNUSED EXCESS-PROFITS CREDIT CARRYOVER

Taxable Year Ended March 31, 1943

It has been determined that you had an unused excess-profits credit carryover from the taxable year ended March 31, 1942, of \$2,871.75 as shown in the following:

Money paid in for stock.....	\$ 975.34
25% of new capital.....	243.84
Average borrowed invested capital.....	34,677.68

Invested capital.....	\$35,896.86
Excess-profits credit (8% of \$35,896.86).....	\$ 2,871.75
Excess-profits net income.....	0.00

Unused excess-profits credit.....	\$ 2,871.75
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COMPUTATION OF EXCESS-PROFITS TAX

Taxable Year Ended March 31, 1943

Excess-profits net income.....		\$20,905.74
Less: Specific exemption	\$5,000.00	
Excess-profits credit		
(8% of \$44,925.62 invested capital)....	3,594.05	
Unused excess-profits credit carryover....	2,871.75	11,465.80
Adjusted excess-profits net income.....		\$ 9,439.94
Excess-profits tax:		
90% of \$9,439.94.....		\$ 8,495.95
(Limitation under section 710(a) (1) (B)		
not applicable)		
Correct excess-profits tax liability.....		\$ 8,495.95
Excess-profits tax assessed (no return filed).....		0.00
Deficiency of excess-profits tax.....		\$ 8,495.95

COMPUTATION OF INCOME TAX

Taxable Year Ended March 31, 1943

Net income adjusted.....		\$16,495.52
Less: Income subject to excess-profits tax.....	\$9,439.94	
Declared value excess-profits tax.....	263.70	9,703.64
Normal-tax net income.....		\$ 6,791.88
Surtax net income.....		\$ 6,791.88
Income tax:		
Normal tax:		
15% of \$5,000.00.....	\$ 750.00	
17% of \$1,791.88.....	304.62	\$ 1,054.62
Surtax:		
10% of \$6,791.88.....		679.19
Correct income tax liability.....		\$ 1,733.81
Income tax assessed:		
Original, Account No. NC 16249.....		None
Deficiency of income tax.....		\$ 1,733.81

ADJUSTMENTS TO NET INCOME

Taxable Year Ended March 31, 1944

Net income as disclosed by return.....		\$ 7,740.04
Unallowable deductions and additional income:		
(a) Deduction for royalties disallowed....	\$57,189.47	
(b) Addition to reserve for bad debts disallowed.....	1,507.14	
(c) Net operating loss deduction disallowed.....	962.80	
(d) Recoveries on bad debts credited to reserve.....	1,598.23	\$61,257.64
Total		\$68,997.68
Additional deduction:		
(e) Bad debts charged off.....		677.28
Net income adjusted.....		\$68,320.40

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained.

(b) and (e) As previously stated you did not secure permission from the Commissioner to change from the specific charge-off method of accounting for bad debts to the reserve basis. Accordingly, the addition to reserve for bad debts claimed in your return in the amount of \$1,507.14 is disallowed and, in lieu thereof, a deduction is allowed in the amount of \$677.28 representing debts which became worthless in the taxable year and were charged off.

(c) The net operating loss deduction of \$962.80, representing a net operating loss carryover from the taxable year ended March 31, 1943, is disallowed because it has been determined that you had a net income, instead of a loss, for that year.

(d) Recoveries on bad debts charged off prior to this taxable year, in the amount of \$1,598.23 were credited to reserve for bad debts in your return. Such amount is here added to your income.

ADJUSTMENTS TO EXCESS-PROFITS NET INCOME

Taxable Year Ended March 31, 1944

Excess profits net income as disclosed by return.....		\$10,471.80
Additional income and unallowable deductions:		
(a) Deduction for royalties disallowed....	\$57,189.47	
(b) Addition to reserve for bad debts disallowed.....	1,507.14	
(c) Net operating loss deduction disallowed.....	962.80	
(d) Recoveries on bad debts credited to reserve	1,598.23	\$61,257.64
Total		\$71,729.44
Additional deduction:		
(e) Bad debts charged off.....		677.28
Excess profits net income adjusted.....		\$71,052.16
(a), (b), (c), (d) and (e) These adjustments are the same as made to net income and previously explained.		

ADJUSTMENTS TO INVESTED CAPITAL

Taxable Year Ended March 31, 1944

Invested capital as disclosed by return.....	\$45,776.80
Additions:	
(a) 25 per cent of increase of new capital.....	500.00
Invested capital adjusted.....	\$46,276.80

EXPLANATION OF ADJUSTMENTS

(a) There is added to the invested capital shown by your return the amount of \$500.00 representing 25 per cent of new capital paid in during a taxable year beginning after December 31, 1940, not previously claimed by you in accordance with section 718 (a) (6) of the Internal Revenue Code.

COMPUTATION OF EXCESS-PROFITS CREDIT

Taxable Year Ended March 31, 1944

Invested capital adjusted.....	\$46,276.80
Excess-profits credit (8% of \$46,276.80).....	3,702.14

COMPUTATION OF EXCESS-PROFITS TAX

Taxable Year Ended March 31, 1944

<i>Tentative tax under section 710(a) (6) (A) Internal Revenue Code</i>		
Excess-profits net income.....		\$71,052.16
Less: Specific exemption	\$5,000.00	
Excess-profits credit.....	3,702.14	8,702.14
Adjusted excess-profits net income.....		\$62,350.02
(a) 90% of \$62,350.02.....		56,115.02
Surtax net income computed without reference to the credit provided in section 26(e).....		\$68,320.40
80% of \$68,320.40.....		\$54,656.32
Less: Income tax (as below).....		1,512.00
(b) Balance		\$53,144.32
<i>Tentative tax under section 710(a) (6) (A) (lesser of items (a) and (b)).....</i>		
		\$53,144.32
<i>Tentative tax under section 710(a) (6) (B) I.R.C.</i>		
Excess-profits net income.....		\$71,052.16
Less: Specific exemption	\$10,000.00	
Excess-profits credit.....	3,702.14	13,702.14
Adjusted excess-profits net income.....		\$57,350.02
(a) 95% of \$57,350.02.....		\$54,482.52
Surtax net income computed without reference to the credit provided in section 26(e).....		\$68,320.40
80% of \$68,320.40.....		\$54,656.32
Less: Income tax (as below).....		2,862.00
(b) Balance		\$51,794.32
<i>Tentative tax under section 710 (a) (6) (B) (lesser of items (a) and (b)).....</i>		
		\$51,794.32
<i>Excess-profits tax under section 710(a) (6) I.R.C.</i>		

1. Tentative tax under section 710(a)(6)(A).....	\$53,144.32
2. Tentative tax under section 710(a)(6)(B).....	\$51,794.32
3. Number of days in taxable year.....	366
4. Number of days before January 1, 1944.....	275
5. Number of days after December 31, 1943.....	91
6. Portion of item 1 which item 4 bears to item 3 (275/366x\$53,144.32)	\$39,930.84
7. Portion of item 2 which item 5 bears to item 3 (91/366x\$51,794.32)	12,877.82
Correct excess-profits tax liability (sum of items 6 and 7).....	\$52,808.66
Excess-profits tax assessed: Original, Account No. NC 801485.....	0.00
Deficiency of excess-profits tax.....	\$52,808.66

COMPUTATION OF INCOME TAX

Taxable Year Ended March 31, 1944

Tentative tax under section 108(b)(1)(A) I.R.C.

Net income	\$68,320.40
Less: Income subject to excess-profits tax.....	62,350.02
Normal-tax net income.....	\$ 5,970.38
Surtax net income.....	\$ 5,970.38
Income tax:	
Normal tax:	
15% of \$5,000.00.....	\$750.00
17% of \$ 976.16.....	164.96
	\$ 914.96
Surtax:	
10% of \$5,970.38.....	\$ 597.04

Tentative tax under section 108(b)(1)(A).....	\$ 1,512.00
---	-------------

Tentative tax under section 108(b)(1)(B) I.R.C.

Net income	\$68,320.40
Less: Income subject to excess-profits tax.....	57,350.02
Normal-tax net income.....	\$10,970.38
Surtax net income.....	10,970.38
Income tax:	
Normal tax:	
15% of \$5,000.00.....	\$ 750.00
17% of \$5,970.38.....	1,014.96
	\$ 1,764.96
Surtax:	
10% of \$10,970.38.....	1,097.04

Tentative tax under section 108(b)(1)(B).....	\$ 2,862.00
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Income tax under section 108(b)(1) I.R.C.

1. Tentative tax under section 108(b)(1)(A).....	\$ 1,512.00
2. Tentative tax under section 108(b)(1)(B).....	2,862.00
3. Number of days in taxable year.....	366
4. Number of days before January 1, 1944.....	275
5. Number of days after December 31, 1943.....	91
6. Portion of item 1 which item 4 bears to item 3 (275/366x\$1,512.00)	\$ 1,136.07
7. Portion of item 2 which item 5 bears to item 3 (91/366x\$2,862.00)	711.59
Correct income tax liability (sum of items 6 and 7).....	\$ 1,847.66
Income tax assessed:	
Original, Account No. Aug. 410040.....	1,989.81
Overassessment of income tax.....	\$ 142.15

ADJUSTMENTS TO NET INCOME

Taxable Year Ended March 31, 1945

Net income as disclosed by return.....	\$ 17,323.25
Additional income and unallowable deductions:	
(a) Deduction for royalties disallowed \$94,637.96	
(b) Recoveries of bad debts..... 476.70	95,114.66
Net income adjusted.....	\$112,437.91

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained.

(b) During the taxable year you credited recoveries of bad debts in the amount of \$476.70 to the reserve for bad debts, and charged the reserve for bad debts with the amount of \$677.28 representing worthless debts. It has been determined that the amount of bad debts charged to the reserve \$677.28, is properly allowable for the taxable year ended March 31, 1944, and has been allowed for that taxable year. The amount of recoveries on bad debts, previously charged off, made during this taxable year, \$476.70 is added to income.

COMPUTATION OF DECLARED VALUE EXCESS PROFITS TAX

Taxable Year Ended March 31, 1945

Net income adjusted.....	\$112,437.91
Less: 10% of \$500,000.00 value of capital stock as declared in capital stock tax return for the year ended June 30, 1944.....	50,000.00
Net income subject to declared value excess-profits tax....	62,437.91
Less: Amount taxable @ 6.5% (5% of \$500,000.00).....	25,000.00

Balance taxable at 13.2%.....	\$ 37,437.91
Declared value excess-profits tax:	
6.6% of \$25,000.00.....	\$1,650.00
13.2% of \$37,437.91.....	4,941.80
	<hr/>
Correct declared value excess-profits tax liability.....	6,591.80
Declared value excess-profits tax assessed:	
Original, Account No. July 410048.....	None
	<hr/>
Deficiency of declared value excess-profits tax.....	\$ 6,591.80

ADJUSTMENTS TO EXCESS-PROFITS NET INCOME

Taxable Year Ended March 31, 1945

Excess-profits net income as disclosed by return.....	\$ 21,782.58
Additional income and unallowable deductions:	
(a) Deduction for royalties disallowed	\$94,637.96
(b) Recoveries on bad debts.....	476.70
	<hr/>
Total	\$116,897.24
Additional deduction:	
(c) Declared value excess-profits tax.....	6,591.80
	<hr/>
Excess-profits net income adjusted.....	\$110,305.44

EXPLANATION OF ADJUSTMENTS

(a) and (b) These adjustments are the same as made to net income and previously explained.

(c) A deduction is allowed for declared value excess-profits tax, not previously claimed by you, in the amount of \$6,591.80.

ADJUSTMENTS TO INVESTED CAPITAL

Taxable Year Ended March 31, 1945

Invested capital as disclosed by return.....	\$54,463.20
Additions:	
(a) Accumulated earnings and profits	
at beginning of taxable year.....	\$12,793.30
(b) 25 per cent increase of new capital	500.00
	<hr/>
Invested capital adjusted.....	\$67,756.50

EXPLANATION OF ADJUSTMENTS

(a) In your return you did not include in invested capital any amount of accumulated earnings and profits at the beginning of the taxable year. It has been determined that you had accumulated earnings and profits at the beginning of the taxable year in the amount of \$12,793.30.

(b) There is added to the invested capital shown by your return the amount of \$500.00 representing 25% increase of new capital paid in during a taxable year beginning after December 31, 1940, not previously claimed by you, in accordance with section 718(a)(6) of the Internal Revenue Code.

COMPUTATION OF EXCESS-PROFITS TAX

Taxable Year Ended March 31, 1945

Excess-profits net income.....		\$110,305.44
Less: Specific exemption	\$10,000.00	
Excess-profits credit (8% of \$67,756.50 invested capital)	5,420.52	15,420.52
Adjusted excess-profits net income.....		\$ 94,884.92
Excess-profits tax:		
(a) 95% of \$94,884.92.....		\$ 90,140.67
Surtax net income computed without reference to the credit provided in section 26(e).....		\$105,846.11
80% of \$105,846.11.....		84,676.89
Less: Income tax (as below).....		2,859.52
(b) Balance		\$ 81,817.37
Total excess-profits tax (lesser of items (a) and (b)).....		\$ 81,817.37
Less: Credit allowable—Section 784 I.R.C.....		8,181.74
Correct excess-profits tax liability.....		\$ 73,635.63
Excess-profits tax assessed:		
Original, Account No. July 400019.....	\$7,054.23	
Less: Credit allowed—Section 784.....	705.42	6,348.81
Deficiency of excess-profits tax.....		\$ 67,286.82

COMPUTATION OF INCOME TAX

Taxable Year Ended March 31, 1945

Net income adjusted.....		\$112,437.91
Less: Income subject to excess-profits tax....	\$94,884.92	
Declared value excess-profits tax.....	6,591.80	\$101,476.72
Normal-tax net income.....		\$ 10,961.19
Surtax net income.....		\$ 10,961.19
Income tax:		
Normal tax:		
15% of \$5,000.00.....	\$ 750.00	
17% of \$5,961.19.....	1,013.40	1,763.40
Surtax		
10% of \$10,961.19.....		1,096.12
Correct income tax liability.....		\$ 2,859.52
Income tax assessed:		
Original, Account No. July 410048.....		2,572.39
Deficiency of income tax.....		\$ 287.13

Received and Filed T.C.U.S. November 12, 1946.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. & 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes and declared value excess-profits taxes for the taxable years ended March 31, 1943, and 1945; and excess-profits taxes for the taxable years ended March 31, 1943, 1944 and 1945; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. (a) through (f). Denies all of the allegations contained in subparagraphs (a) to (f) inclusive, of paragraph 4 of the petition.

5 (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) to (i) inclusive. Denies the allegations contained in subparagraphs (b) to (i) inclusive, of paragraph 5 of the petition.

6. Denies each and every allegation contained in

the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHELL, ECC
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
Special Attorney,
Bureau of Internal Revenue.

Received and Filed T.C.U.S. December 31, 1946.

[Title of Tax Court and Cause.]

AMENDED PETITION

The petition in the above-entitled proceeding is hereby amended to read as follows:

“The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols LA:IT:90D:PAK), dated August 16, 1946, and as a basis of this proceeding alleges as follows:

“1. The petitioner is a corporation with its principal office at 234 East Colorado Street, Pasadena 1, California. The returns for the periods here in-

volved were filed with the Collector of Internal Revenue for the Sixth District of California.

“2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on or about August 16, 1946.

“3. The taxes in controversy are income taxes, declared value excess-profits taxes and excess-profits taxes for the following years and in the following amounts:

Year Ended	Income Taxes	Declared Value Excess-Profits Taxes	Excess-Profits Taxes
March 31, 1943.....	\$1,733.81	\$ 263.70	\$ 8,495.95
March 31, 1944.....	—	—	\$52,808.66
March 31, 1945.....	\$ 287.13	\$6,591.80	\$67,286.82

“4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

(a) The respondent erred in disallowing as deductions for the taxable years ended March 31, 1943, March 31, 1944, and March 31, 1945, royalties paid in the respective amounts of \$17,485.32, \$57,189.47 and \$94,637.96.

(b) The respondent erred in determining that said royalty payments were capital expenditures.

(c) If the Court should find that the above referred to payments are not in the nature of royalties, then the respondent erred in disallowing said payments as deductions in the years indicated for the reason that said payments were made solely for the cancellation of an onerous contract.

(d) The respondent erred in disallowing as a deduction for the taxable year ended March 31, 1943,

the entire lump sum payment made during that year of \$35,000.00 under the agreement of cancellation of the above-referred-to contract.

(e) The respondent erred in failing to allow as a deduction from income the sum of \$2,023.81, interest paid by petitioner during the taxable year ended March 31, 1943.

(f) The respondent erred in failing to allow as a part of petitioner's invested capital for the fiscal years ending March 31, 1944, and March 31, 1945, the amount of the post-war refund credit determined for the previous two years.

(g) The respondent erred in failing to allow as a credit to the excess-profits tax determined for the fiscal years ending March 31, 1943, and March 31, 1944, the post-war refund credit of excess-profits tax as provided in Sections 780 and 781 of the Internal Revenue Code.

"5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner is a corporation organized and existing under and by virtue of the laws of the State of California. Petitioner is now and since the date of its incorporation on or about March 27, 1941, has been engaged in the sale and distribution of vitamin food concentrates, with its principal office at 234 East Colorado Street, Pasadena 1, California.

(b) On or about May 5, 1941, petitioner, The Vita-Food Corporation and Shaler Food Products Company entered into an agreement under the terms of which The Vita-Food Corporation was to

manufacture and petitioner was to sell and distribute certain vitamin food concentrates to be known as "The Stuart Formula."

(c) Operations under the above-referred-to contract were never satisfactory or profitable to the petitioner for many reasons. Chiefly, the pricing arrangement did not permit petitioner to make a profit, and the product which The Vita-Food Corporation supplied was inferior and undependable in quality. As a result, disputes arose and on or about November 28, 1942, petitioner and The Vita-Food Corporation entered in Agreement of Settlement of Litigation and Cancellation of Contract.

(d) Under the above-referred-to agreement of cancellation of contract, petitioner agreed to pay The Vita-Food Corporation, and did pay as indicated upon its returns for the years here in question, the sums of \$35,000.00 upon execution of the agreement, \$40,000.00 at the rate of \$4,000.00 per month, and \$122,700.00, payable as royalties based upon units of vitamin concentrates sold.

(e) Petitioner did not make any part of said payments for the purpose of acquiring a capital asset, but did make all of said payments as royalties and/or for the cancellation of an onerous contract. Notwithstanding this fact, the respondent has erroneously and illegally determined that all of said payments were capital expenditures made for the acquisition of a capital asset.

(f) Petitioner is informed and believes and upon such information and belief alleges that if it

was not at all times the owner of the trade name "The Stuart Formula," that registration of such trade-mark was cancellable upon petition to the United States Patent Office by petitioner. Notwithstanding this fact, the respondent has erroneously and illegally determined that the above-referred-to payments were made for the purpose of acquiring exclusive rights to the use of said trade name.

(g) Petitioner is informed and believes, and upon such information and belief alleges, that the name "The Stuart Formula" was without value at the time of the above-referred-to agreement of cancellation of contract was entered into. Notwithstanding this fact, the respondent has erroneously and illegally determined that all the payments made by petitioner under said agreement of cancellation of contract were made for the purpose of acquiring exclusive right to the use of said trade name.

(h) Under dates of September 12, 1942; September 23, 1942, and September 30, 1942, petitioner made payments of interest totaling \$2,023.81 upon notes of Shaler Food Products Company, which petitioner assumed as a result of a merger between petitioner and the Shaler Food Products Company on or about July 3, 1942. Notwithstanding this fact, the respondent has erroneously and illegally failed to allow said interest payments as a deduction for the taxable year ended March 31, 1943.

(i) Petitioner keeps its books and accounts and files its return on the accrual basis of accounting.

In the notice of deficiency, the respondent has determined excess-profits taxes for the fiscal year ending of March 31, 1943, of \$8,495.95 and for the fiscal year ending March 31, 1944, of \$52,808.66. The post-war credit for the two years indicated would be \$849.60 and \$5,280.87, respectively, which would constitute earnings and profits at the beginning of the respective years and a part of the invested capital of petitioner. Notwithstanding the above facts, the respondent has failed and neglected to allow any of the above sums in either of the fiscal years ending March 31, 1944, and March 31, 1945, contrary to the provisions of Section 718 of the Internal Revenue Code.

(j) For the fiscal year ending March 31, 1943, petitioner showed no excess-profits tax on its excess-profits tax return, Treasury Form 1121. The respondent's notice of determination shows a deficiency of excess-profits tax liability of \$8,495.95, but fails to show any post-war refund credit, as provided by Sections 780, 781 and 784 of the Internal Revenue Code. By reason of this fact, the respondent has overstated the deficiency for said year in the sum of \$849.60.

For the fiscal year ending March 31, 1944, petitioner showed no excess-profits tax on its return, Treasury Form 1121. The respondent's notice of determination shows an excess-profits tax liability of \$52,808.66, but fails to show any post-war refund credit, as provided by Sections 780, 781 and 784 of the Internal Revenue Code. By reason of this fact, respondent has overstated the deficiency for said year in the sum of at least \$5,280.87.

“Wherefore, petitioner prays that The Tax Court of the United States hear this proceeding and re-determine the aforesaid taxes in accordance with the rights of the petitioner in the premises; that overpayment be determined for the various years indicated by reason of the additional deductions, post-war refund credits, additions to invested capital, and other adjustments as alleged herein, the amount of which may be determined under Rule 50; and grant such other and further relief, including refunds, as to it may seem just and proper in the premises.”

/s/ A. CALDER MACKAY,

/s/ ARTHUR MCGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ F. EDWARD LITTLE,

Counsel for Petitioner.

Of Counsel:

/s/ ROBERT H. DUNLAP.

State of California,
County of Los Angeles—ss.

Arthur Hanisch, being duly sworn, deposes and says: That he is the president of the Stuart Company, the petitioner named in the foregoing Amended Petition; that he is duly authorized to verify the same; that he has read the said amended petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on informa-

tion or belief, and as to those matters he believes it to be true.

/s/ ARTHUR HANISCH.

Subscribed and sworn to before me this 20th day of January, 1948.

[Seal] /s/ DOROTHY ERBEN,

Notary Public in and for the Said County and State.

My Commission Expires Sept. 28, 1951.

Filed at Hearing, January 28, 1948.

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the amended petition.

3. Admits that the taxes in controversy are income taxes and declared value excess profits taxes for the taxable years ended March 31, 1943, and 1945, and excess profits taxes for the taxable years ended March 31, 1943, 1944 and 1945; but denies the remainder of the allegations contained in paragraph 3 of the amended petition.

4 (a) to (g) inclusive. Denies all of the allegations of error alleged in subparagraphs (a) to (g) inclusive of paragraph 4 of the amended petition.

5 (a). Admits the allegations contained in sub-

paragraph (a) of paragraph 5 of the amended petition;

(b). Admits that the petitioner, the Vita-Food Corporation and the Shaler Food Products Company entered into an agreement dated May 5, 1941, under the terms of which the Vita-Food Corporation was to manufacture and sell to petitioner for sale and distribution, said vitamin food concentrates to be known as the "The Stuart Formula," as alleged in subparagraph (b) of paragraph 5 of the amended petition;

(c). Denies the allegations contained in subparagraph (c) of paragraph 5 of the amended petition, except that respondent admits that on or about November 28, 1942, the petitioner and the Vita-Food Corporation entered into an agreement entitled "Agreement of Settlement of Litigation and Cancellation of Contract."

(d). Denies the allegations contained in subparagraph (d) of paragraph 5 of the amended petition except that respondent admits that under the agreement referred to, the petitioner agreed to pay the Vita-Food Corporation the sums of \$35,000.00 upon execution of the agreement, \$40,000.00 at the rate of \$4,000.00 per month and a balance of \$122,700.00, but denies the remainder of the allegations contained in said subparagraph.

(e) to (h) inclusive. Denies the allegations contained in subparagraphs (e) to (h) inclusive in paragraph 5 of the amended petition.

(i). Admits the allegations contained in the first two sentences of subparagraph (i) of paragraph 5

of the amended petition; denies the allegations contained in the third sentence of subparagraph (i) of paragraph 5 of the amended petition; and denies that respondent acted contrary to the provisions of Section 718 of the Internal Revenue Code in failing to include in the computation of petitioner's invested capital, for the taxable years ended March 31, 1943, and 1944, a post-war credit.

(j). Admits the allegations contained in subparagraph (j), and all subdivisions thereof, of paragraph 5 of the amended petition, except that respondent denies that the deficiencies in excess profits taxes determined to be due from the petitioner for the fiscal years ended March 31, 1943, and 1944, have been, or are, overstated in the amounts of \$849.60 and \$5,280.87, respectively, or in any other amounts.

6. Denies each and every allegation contained in the amended petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner of Internal Revenue be approved.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,

R. E. MAIDEN,

Special Attorneys,

Bureau of Internal Revenue.

Filed at Hearing January 28, 1948.

[Title of Tax Court and Cause.]

SECOND AMENDMENT TO PETITION

The petition in the above-entitled proceeding is hereby amended as follows:

1. By adding to Paragraph 3 the following:

“; also in controversy are alleged overpayments of income taxes, declared value excess-profits taxes and excess-profits taxes in a yet undetermined amount.”

2. By adding to Paragraph 4 a new subparagraph as follows:

“(h) If the Court should find that the payments made under the agreement of November 28, 1942, by petitioner to Vita-Food Corporation were for the cancellation of an onerous contract and constitute ordinary and necessary expense and should be accrued as of the date of said agreement, then the respondent erred in failing to allow the loss sustained during the fiscal year ending March 31, 1943, as a net operating loss carryover for the fiscal years ended March 31, 1944, and March 31, 1945, within the purview of Section 122 of the Internal Revenue Code, and in failing to determine an overpayment of said taxes by reason thereof.”

3. By adding to Paragraph 5 two new subparagraphs as follows:

“(k) If the Court should find that the payments made as alleged under Paragraph 5 (d) of the petition under the cancellation agreement of November 28, 1942, to Vita-Food Corporation are accruable as an expense and all deductible in the fiscal year ended March 31, 1943, then and in that event the petitioner suffered a net operating loss within the purview of

Section 122 of the Internal Revenue Code which should be carried over to offset income for the fiscal years ended March 31, 1944, and March 31, 1945. In such event, petitioner has overpaid its taxes for each of the years ended March 31, 1944, and March 31, 1945, which should be refunded to petitioner.

"(1) All taxes in controversy which might give rise to the overpayment of tax were paid by petitioner within three years prior to the mailing by respondent of the notice of deficiency, which was mailed within three years after the returns were filed."

3. By striking the prayer of the amended petition and inserting in lieu thereof the following:

"Wherefore, petitioner prays that the Tax Court of the United States hear this proceeding and re-determine the aforesaid taxes in accordance with the rights of the petitioner in the premises; that overpayment be determined for the various years indicated by reason of the additional deductions, post-war refund credits, additions to invested capital, net operating loss carryovers, and other adjustments as alleged herein, the amount of which may be determined under Rule 50; and grant such other and further relief, including refunds, as it may seem just and proper in the premises."

/s/ A. CALDER MACKAY,

/s/ ARTHUR MCGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ F. EDWARD LITTLE,

Counsel for Petitioner.

Of counsel:

/s/ ROBERT H. DUNLAP.

State of California,
County of Los Angeles—ss.

Arthur Hanisch, being duly sworn, deposes and says: That he is the president of The Stuart Company, the petitioner named in the foregoing Amendment to Petition; that he is duly authorized to verify the same; that he has read the said amendment to petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters he believes it to be true.

/s/ ARTHUR HANISCH.

Subscribed and sworn to before me this 31st day of January, 1948.

/s/ CLIFTON H. JACK,

Deputy Clerk, The Tax
Court of the U. S.

Filed at Hearing January 31, 1948.

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENT TO PETITION

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the amendment to the petition, denies as follows:

1, 2 and 3. Denies the material allegations con-

tained in paragraphs 1 to 3, inclusive, and all subdivisions thereof, of the amendment to the petition.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
E. C. CROUTER,
R. E. MAIDEN, JR.,
Special Attorneys,
Bureau of Internal Revenue.

Received and filed T.C.U.S. March 10, 1948.

Served Mar. 11, 1948.

The Tax Court of the United States
Docket No. 12473

THE STUART COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On the facts, held, that \$75,000 paid by the petitioner to secure the cancellation of an onerous contract is properly deductible during the fiscal year 1943 as an ordinary and necessary business expense, and that \$122,700 which the petitioner was obligated to pay for the purchase of a trade-mark is a capital expenditure which is not deductible as an ordinary and necessary business expense.

A. CALDER MACKAY, ESQ.,
ARTHUR MCGREGOR, ESQ.,
and

F. EDWARD LITTLE, ESQ.,
For the Petitioner.

R. E. MAIDEN, ESQ.,
For the Respondent.

MEMORANDUM FINDINGS OF FACT
AND OPINION

The Commissioner has determined deficiencies in the petitioner's income tax, declared-value excess profits tax, and excess profits tax for the fiscal years

ended March 31, 1943; March 31, 1944, and March 31, 1945, as follows:

Fiscal Year Ended	Income Tax	Declared-Value Excess-Profits Tax	Excess-Profits Tax
March 31, 1943.....	\$1,733.81	\$ 263.70	\$ 8,495.95
March 31, 1944.....	—	—	52,808.66
March 31, 1945.....	287.13	6,591.80	67,286.82

The issue in this proceeding is whether certain payments made by the petitioner during the years in question were made, either in part or in whole, to secure the cancellation of an onerous contract; or whether they were made, either in part or in whole, for the purchase of a trade-mark. The respondent contends that the entire payments were capital expenditures made to purchase a trade-mark and has asserted the above deficiencies. The petitioner contends that the entire payments were ordinary and necessary business expenses made to secure relief from an onerous contract and claims an overpayment in his taxes for the years in question.

The parties are in agreement on a number of other issues raised by the pleadings relative to adjustments in the petitioner's taxes for the years in question which are dependent upon the decision of the main issue in the proceeding.

The petitioner filed its returns for the years in question with the collector for the sixth district of California.

The record in this proceeding consists of oral testimony and various exhibits.

Findings of Fact

Sometime in the fall of 1940, Arthur Hanisch, who was the principal organizer and stockholder of The Stuart Company, which is the petitioner herein, decided to go into business in California. In December of 1940, Hanisch was introduced to Dr. Henry Borsook, who was a professor of biochemistry at the California Institute of Technology, and Maxwell H. Lewis, who was the vice-president of The Vita-Food Corporation (hereinafter referred to as "Vita-Food") which had been organized under the laws of California in November, 1940.

Dr. Borsook was interested in providing adequate vitamin concentrates to the greatest number of people at the lowest possible cost and had done a great deal of research in vitamins and in nutrition. He was a consultant to Vita-Food which manufactured and distributed locally at this time a vitamin concentrate which had been developed under the supervision of Dr. Borsook. Vita-Food was primarily interested in the manufacture of the vitamin concentrates and desired to associate itself with someone who would be willing to undertake national distribution of its vitamin products. Accordingly, on February 3, 1941, Hanisch entered into an informal agreement with Vita-Food which provided that Hanisch was to set up a sales and merchandising organization to distribute the vitamin concentrate produced by Vita-Food at stipulated retail prices. Hanisch agreed to purchase 3,000 gallons of the vitamin concentrate from Vita-Food and to market it under a trade name which would remain the property of Vita-Food.

On March 8, 1941, Hanisch entered into a subsequent informal agreement with Vita-Food under which he agreed to purchase an additional 3,000 gallons of the vitamin concentrate. This agreement also provided that:

We [Vita-Food] understand that you [Hanisch] are in process of forming two corporations, one to be named "The Shaler Food Products Company," which company will sell to food outlets, under the name "Vitaplex" the concentrate purchased by you under our said letter of February 3rd, upon condition that such outlets sell the same to consumers at a price not in excess of \$1.60 per 16 oz. bottle; and the other to be named "The Stuart Company," whose sales will be confined to drug stores and allied outlets [under the name "The Stuart Formula"] for resale at a price not in excess of \$1.85 per 16 oz. bottle.

We further understand it is your desire, and it is agreeable to us that, as soon as these corporations have been organized, separate written contracts will be entered into between them and ourselves embodying the applicable matters above set out as well as the conditions of future purchases and sale by them of said product in accordance with understandings had at our recent conferences.

By March 27, 1941, Hanisch had completed the organization of the two corporations; and The Stuart Company, which was named after Hanisch's younger son, was incorporated under the laws of

California on that date. This corporation, which is the petitioner herein, was organized to distribute the vitamin concentrate manufactured by Vita-Food under the trade name "The Stuart Formula" by making a personal approach to doctors and inducing them to recommend the product to their patients. "The Stuart Formula" was never advertised to the public and was sold only in drug stores.

During the years in question, The Stuart Company kept its books and filed its returns on an accrual basis of accounting. Its fiscal year ended on March 31, of each year.

Hanisch paid \$1,000 to The Stuart Company in exchange for its entire authorized capital stock of 1,000 shares at a par value of \$1 per share. Hanisch then transferred 250 shares of stock to two of his associates in the organizing of the corporation and transferred 150 shares to Maxwell H. Lewis, as the representative of Vita-Food. He retained 600 shares for himself. Between May 5, 1941, and November 28, 1942, Hanisch loaned \$70,000 to The Stuart Company for working capital.

The Shaler Food Products Company, named after Hanisch's elder son, was also incorporated under the laws of California on March 27, 1941. It was organized to distribute through grocery stores a similar vitamin concentrate manufactured by Vita-Food under the trade names "Vitaplex" and "Calplex." "Vitaplex" and "Calplex" were advertised directly to the public.

Hanisch paid \$1,000 to The Shaler Food Products Company in exchange for its entire authorized capi-

tal stock of 1,000 shares at a par value of \$1 per share. Hanisch then transferred 250 shares of stock to two of his associates in the organizing of the corporation and transferred 150 shares to Maxwell H. Lewis, as representative of Vita-Food. He retained 600 shares for himself.

On May 5, 1941, The Stuart Company and The Shaler Food Products Company as first parties, Vita-Food as second party, and Hanisch as third party entered into a formal written contract which memorialized the prior informal agreements between Hanisch and Vita-Food. This contract provided, inter alia:

2. The Stuart Company, one of first parties, agrees that the concentrate received by it under said contract of March 7, 1941, will be sold and distributed under second party's trade-mark or label "The Stuart Formula" and/or under such other of second party's trade-marks or labels as may be mutually agreed upon by first and second parties, to retail at \$1.95 per pint bottle plus any applicable sales tax.

3. Shaler Food Products Company, one of first parties, agrees that the concentrate received by it under said contract of February 3, 1941, will be sold and distributed under second party's trade-mark or label "Vitaplex" and/or under such other of second party's trade-marks or labels as may be mutually agreed upon by first and second parties to retail at \$1.59 per pint and 69c per 5 fluid ounces, plus any applicable sales tax.

4. First parties shall, within a reasonable time, undertake and carry on at their sole expense, an appropriate and adequate sales campaign for the purpose of creating and maintaining a satisfactory market for such products.

5. Except as herein otherwise provided, the products of second party shall be sold for commercial use and resale only through first parties, but it is understood that second party can not economically operate its plant at an average production of less than 2,000 pints per day of all items and the prices to be paid to second party for its said products as hereinafter set out are based upon this fact. * * *

6. First parties shall have the exclusive right to sell said Vitaplex and Stuart Formula until November 1, 1941. Such right shall continue thereafter until November 1, 1941. Such right shall continue thereafter until and unless terminated by written notice from second party, provided, however, that such termination shall not become effective until and unless during any sixty day period between said November 1, 1941, and May 1, 1942, the combined purchases of such products by first parties from second party shall not have averaged fifteen hundred pints per day, or unless during any sixty day period after said May 1, 1942, such purchases shall not have averaged two thousand pints per day; and, provided further, the date of any such termination shall be not less than sixty days from and after such notice of termination of said right. In determining performance hereunder consideration shall be given to

purchases by first parties from second party of any other products on a dollar basis at the prices paid therefor. First parties shall not be held to strict performance hereunder if such failure is due to conditions beyond their control, such as adverse legislation, strikes and/or delays in transportation.

7. First parties shall handle no other products than those manufactured or produced by second party, and shall be the sole distributors of all products manufactured or produced by second party except as herein otherwise provided.

* * *

10. Any and all trade-marks or labels under which the concentrates hereinbefore specifically described or any other products manufactured by second party which may hereafter be marketed or distributed or offered for sale by first parties or either thereof, shall at all times be and remain the sole and exclusive property of second party, and the right or rights of first parties to distribute and/or market or offer for sale such products or any other product hereafter produced by second party shall continue only so long as this agreement is in full force and effect.

11. Second party shall not directly or indirectly sell any of its products to any person, firm or corporation other than first parties, save and except the product now being marketed under the name "Vital" in Los Angeles County, * * *

12. Second party agrees to fill all orders placed

by first parties as promptly as possible consistent with the receipt of materials, conditions of labor, and other matters within its control. * * *

* * *

19. This contract shall remain in full force and effect for the period of ten years from and after the date hereof, and may be extended at the option of first parties for an additional period of ten years by written notice to second party, * * * provided, however, that this contract may be terminated by second party if for any sixty consecutive days, at any time after November 1, 1941, first parties shall not have purchased the minimum quantities of products hereinbefore specified in paragraph 6 (six) hereof, upon sixty days notice of intention so to do, unless during such sixty-day period any such deficiency shall be removed and the minimum quantities aforesaid ordered and paid for; otherwise, all rights of first and third parties hereunder shall cease at the expiration of the sixty-day period specified in such notice of termination.

Vita-Food experienced certain difficulties during 1941 in the manufacture of the vitamin concentrates which it supplied to The Stuart Company and to The Shaler Food Products Company for distribution. The bottled product sometimes became gaseous from exposure to the sun and exploded or ran over the sides of the bottle. The total damage was less than 1 per cent of the gross sales of the vitamin concentrates. Vita-Food made complete restitution of all damage caused, and by the end of 1941 had

solved the problem by making a minor change in the formula.

On June 23, 1942, a certificate of registration of the trade-mark "The Stuart Formula" was issued to Vita-Food by the Secretary of State of California. On September 8, 1942, the United States Commissioner of Patents issued to Vita-Food a certificate of registration of the trade-mark "The Stuart Formula" in accordance with an application under the Trade-mark Act of 1920 which had been made by Vita-Food on May 15, 1941.

The operations of The Shaler Food Products Company were never successful and that corporation was merged with the petitioner on July 3, 1942. The petitioner subsequently received permission from the Commissioner of Corporations to increase its capital stock by 1,000 shares, and these additional shares were issued to its original stockholders in proportion to their holdings.

As early as February, 1942, the petitioner began negotiations with Vita-Food in order to modify the contract of May 5, 1941. Petitioner desired to acquire an express owner's interest in the trade-mark and wanted to obtain lower purchase quotas and lower purchase costs. In August, 1942, the petitioner informed Vita-Food that it would not undertake an extensive sales promotion campaign unless it was given an interest in the trade-mark. On August 10, 1942, Vita-Food submitted a redraft of the contract to the petitioner, in which the petitioner was given a conditional one-half interest in the trade-mark, provided its sales reached and main-

tained a certain level. The petitioner rejected this redraft because it was not given a one-half interest in the trade-mark in fee simple and because the cost and the purchase quotas were not satisfactorily adjusted.

In September, 1942, Hanisch was informed that it was possible to obtain the vitamin products which were being supplied to The Stuart Company by Vita-Food for approximately one-half the price that Vita-Food was charging. Thereupon, Hanisch made an independent investigation of the price at which comparable products could be obtained from other manufacturers and discovered that they were available at substantially lower prices.

The petitioner was never able to meet the purchase quotas called for by paragraph 6 of the contract of May 5, 1941, and on October 8, 1942, Vita-Food served written notice on petitioner that since "you have failed to meet your quotas for the 60-day period from and after August 1, 1942, * * * your exclusive right to sell under the said contract is hereby terminated in accordance with paragraph 6 thereof. This termination shall be effective sixty (60) days after the service of this notice. In all other respects, the contract remains in full force and effect."

On October 12, 1942, the petitioner informed Vita-Food that:

We shall endeavor to the best of our ability to reinstate the contract dated May 5, 1941, by removing the shortages in quotas. However, in

fairness to you, we should inform you that we do not believe this will be possible.

If we are unable to reinstate the contract we shall regard it as terminated for all purposes, at the expiration of 60 days from date of notice, in accordance with the provisions of Paragraph 19 thereof which incorporates Paragraph 6 of the contract.

You having given notice of termination the same is accepted in accordance with the provisions of the contract and we do not concede the existence of any such intermediate procedure as you suggest. No attempt on your part to withdraw the notice will be recognized.

The petitioner then consulted three trade-mark counsel on the question of the ownership of the trade-mark "The Stuart Formula." Two of the opinions received were to the effect that the ownership of the trade-mark was in Vita-Food; one of the opinions declared that in so far as the contract of May 5, 1941, purported to invest in Vita-Food the title to the trade-mark it was a nullity, and that the registration of the trade-mark by Vita-Food was cancellable upon application by the petitioner to the United States Patent Office.

The petitioner and Hanisch, acting individually, began a series of conferences with Vita-Food on November 18, 1942, in order to settle their differences. These conferences were unsuccessful, and on November 23, 1942, the petitioner and Hanisch sent to Vita-Food a notice of rescission of the contract

of May 5, 1941, based upon fraud in the inception of the contract and failure of consideration in its performance.

On November 25, 1942, Vita-Food filed suit in the Superior Court of the State of California for the County of Los Angeles, in which it asked that court to permanently enjoin the petitioner and Hanisch from using the trade-mark "The Stuart Formula" upon any product not manufactured by Vita-Food. On November 25, 1942, the court issued a restraining order temporarily enjoining the petitioner from using the trade-mark, as requested by Vita-Food, and ordered the petitioner to appear on a specified date and show cause why the restraining order should not be made permanent.

Prior to the expiration of the time for the filing of an answer by petitioner, negotiations were resumed between petitioner and Vita-Food, and a settlement of the difficulties between the parties was reached. This agreement was entitled "Agreement of Settlement of Litigation and Cancellation of Contract," and provided:

It is hereby agreed by and between The Vita-Food Corporation, first party; The Stuart Company, second party, and Arthur O. Hanisch, third party, as follows:

Whereas an action is now pending in the Los Angeles County Superior Court by first party as plaintiff against second and third parties and others as defendants, being Action No. 482045, and Whereas the parties hereto did on May 5, 1941, execute an agreement in writing to which

reference is hereby made for full details, and Whereas the parties hereto desire to settle and adjust all their disputes and differences against and with each other whether involved in said pending litigation or otherwise, so that said action can be dismissed, said contract cancelled and terminated, and Whereas said litigation involves the dispute, among other things, as to the claim of second party to the ownership of a trade-mark, "The Stuart Formula," which trade-mark second party claims to own, and Whereas second party desires to maintain the continuity of the present market therefor, and Whereas first party in addition to the covenants of the second and third party herein and as a part thereof relies upon the personal ability of third party as managing agent of second party.

Now Therefore It Is Agreed:

1. First party agrees to dismiss with prejudice said action No. 482045. All parties hereto agree that the said agreement of May 5, 1941, is hereby cancelled and terminated as fully and to the same extent as though the same had never been executed, and all parties hereto hereby waive and release any and all claims and demands of every kind, character or description which any thereof have, or may have or claim to have against any thereof, or the officers, agents, or employees of any of them, whether by reason of said contract or otherwise. * * *

2. First party quitclaims without warranty (except that it does warrant that it has not heretofore conveyed, assigned or encumbered any right therein) to the second party the trade-mark "The Stuart Formula." First party agrees to execute appropriate assignments, if requested, or registrations on file with the Secretary of State of the State of California and the U. S. Commissioner of Patents.

3. Second and third parties agree to pay to First Party the sum of \$75,000.00, as follows: \$35,000.00, upon the execution of this agreement, receipt of which is hereby acknowledged by first party, and \$40,000.00, payable at the rate of \$4,000.00, per month as per note executed concurrently herewith, which note shall be an obligation independent of but not in addition to the above amount.

4. Second party agrees to pay to first party on a royalty basis and as additional consideration for the execution of this agreement the sum of \$122,700.00, which sum is additional to the above mentioned \$75,000.00. The said \$122,700.00, shall be paid at the rate of $7\frac{1}{2}$ cents per unit of vitamin concentrates as sold and marketed by second party beginning October 1, 1943, and continuing until the said sum of \$122,700, is fully paid. * * * Such payments shall be paid on the equivalent of the said unit of vitamin concentrates whether the same shall hereafter be sold and marketed in liquid, tablet, or in any other physical form or whatever the size of the package or packages by second party, whether sold under the trade-mark The Stuart Formula or not. * * *

6. Second and third parties agree that if prior to full payment of the sums agreed to be paid to first party in accordance with paragraphs 3 and 4 hereof either (a) the business of second party is sold or (b) the good will of the business of second party is sold or (c) the trade-mark "The Stuart Formula" is sold or licensed by second party to any other person, firm or corporation, or (d) an attempt is made by second or third party to do any of the acts in this paragraph 6 specified, then, and in any such event, the balance remaining unpaid upon the obligations of second party set forth in par. 4 hereof shall become forthwith due and payable by second and third parties jointly and severally to first party.

7. In the event of the abandonment of said trade-mark "The Stuart Formula" by Second Party or of the insolvency or bankruptcy of second party the trade-mark "The Stuart Formula" and all registrations thereof shall vest in and be the property of first party. * * *

8. Arthur O. Hanisch third party covenants and agrees that until full payment of the sum specified in paragraph 4 hereof he will not pledge or assign his stock in second party so as to reduce his holdings to less than 51% of the capital stock of second party. Third party understands and agrees that his obligations herein set forth are primary upon him with reference to the provisions set forth in paragraphs 3, 5, 6 and 8 but not paragraph 4, except as referred to in paragraphs 5, 6, and 8, and not merely those of guarantor or surety.

9. Second and Third parties hereby waive and relinquish to and in favor of First party any claims or interest that they or either of them may have in and to the trade-marks named as follows: "Vitall," "Calplex," "Made by the Calplex Process," "Buoyant B" and "Vita-Diet."

* * *

12. First party hereby assigns to third party whatever capital stock of second party and/or Shalor Food Products Company now standing in the name of Max H. Lewis, which is represented by certificates now in possession of second party.

* * *

On November 30, 1942, Vita-Food delivered to the petitioner the certificates of registration of the trade-mark "The Stuart Formula," which Vita-Food had obtained in its name. A formal assignment of Vita-Food's interest in the trade-mark to the petitioner was executed by Vita-Food on June 24, 1943.

From May 5, 1941, to October 31, 1942, the petitioner made gross sales of "The Stuart Formula" totalling \$437,613.87. During that period 17,428 doctors were personally contacted and induced to recommend "The Stuart Formula" to their patients, and 6,746 drug stores were retailing "The Stuart Formula."

From the date of its organization on March 27, 1941, until October 31, 1942, the petitioner suffered net operating losses, as shown by its books, which totalled \$15,451.56. On October 31, 1942, the peti-

tioner had total assets of \$62,159.47, and total liabilities of \$82,489.98.

Since November 28, 1942, the petitioner has distributed vitamin concentrates produced by other vitamin manufacturers under the trade name "The Stuart Formula."

The shares of stock in the petitioner had no value on November 28, 1942.

The petitioner was primarily obligated to pay \$75,000 to Vita-Food under the contract of November 28, 1942, in order to secure the cancellation of an onerous contract, of which \$35,000 was paid upon the execution of the agreement and \$40,000 was paid from December, 1942, through September, 1943, in monthly installments of \$4,000 each.

The petitioner was also primarily obligated to pay \$122,700 to Vita-Food under the contract of November 28, 1942, for the purchase of the trademark, "The Stuart Formula," at the rate of 7½ cents per unit of vitamin concentrates sold by the petitioner after October 1, 1943.

OPINION

Harron, Judge:

The issue in this proceeding is whether, considering all the facts, the payments made by the petitioner pursuant to the contract of November 28, 1942, were made, either in part or in whole, for the purpose of cancelling an onerous contract as contended by the petitioner; or whether they were made, either in part or in whole, for the purchase

of the trade-mark, "The Stuart Formula," as contended by the respondent.

It is well settled that payments made to secure relief from an onerous contract are deductible as ordinary and necessary business expenses under section 23(a) of the Internal Revenue Code. *Helvering v. Community Bond & Mortgage Co.*, 74 Fed. (2d) 727; affirming 27 B.T.A. 480; *Alexander J. Cassatt*, 47 B.T.A. 400; aff'd., 137 Fed. (2d) 745; *Cleveland Allerton Hotel, Inc., v. Commissioner*, 166 Fed. (2d) 805. And it is equally well settled that the purchase of a trade-mark is a capital expenditure, no part of which is deductible as a business expense. *Seattle Brewing & Malting Co.*, 6 T.C. 856; aff'd., per curiam, 165 Fed. (2d) 216; *Coca-Cola Bottling Co.*, 6 B.T.A. 1333; cf. *Rainier Brewing Co.*, 7 T.C. 162; aff'd., per curiam, 165 Fed (2d) 217.

Upon careful consideration of the terms of the contract of November 28, 1942, the conduct of the parties in the execution of its provisions, their statements, the testimony of disinterested witnesses, and our examination of the various other contracts and exhibits placed in evidence at the trial, we have concluded that the petitioner, which was on an accrual basis, was obligated to pay \$75,000 to Vita-Food to secure cancellation of the contract whereby it was bound to buy vitamin products exclusively from Vita-Food, and that the petitioner was obligated to pay \$122,700 to Vita-Food for the purchase of the trade-mark, "The Stuart Formula."

The evidence discloses that the petitioner desired to abrogate the contract under which it was bound

to buy all the vitamin products which it distributed from Vita-Food because it could obtain similar vitamin concentrates at substantially lower prices from other manufacturers. It therefore entered into negotiations with Vita-Food to effect a settlement of the contract. These negotiations were finally successful, and we have found as a fact that, as part of the settlement agreement, the petitioner agreed to pay \$75,000 to Vita-Food to cancel the contract.

Examination of the evidence also discloses that the remainder of the consideration called for by the contract is properly allocable to the purchase of the trade-mark, "The Stuart Formula." The petitioner desired to continue in the business of distributing vitamin concentrates to retail outlets. Much good will had been built up for "The Stuart Formula" through the extensive merchandising campaign conducted by the petitioner during 1941 and 1942. Prior to November 28, 1942, the petitioner made a number of attempts to purchase an interest in the trade-mark, but was unable to achieve a satisfactory agreement with Vita-Food. From May 5, 1941, to October 31, 1942, the petitioner made gross sales of "The Stuart Formula" totalling \$437,613.87. During that period, 17,428 individual doctors had been personally contacted and induced to recommend "The Stuart Formula" to patients who were in need of additional vitamins and vitamin concentrates under the name "The Stuart Formula" were being retailed by 6,746 different drug stores. From our examination of all the evidence, we have found as a fact that the petitioner pur-

chased the trade-mark, "The Stuart Formula," for \$122,700, to be paid at the rate of 7½ cents per unit of vitamin concentrates sold by the petitioner after October 1, 1943.

As part of the settlement agreement between the petitioner and Vita-Food, Vita-Food assigned to Hanisch 300 shares of stock of the petitioner which had been issued to Maxwell H. Lewis as representative of Vita-Food. The petitioner introduced competent evidence that this stock had no value on November 28, 1942, and respondent has made no contention that it did have any value. We have found as a fact that the 300 shares of stock assigned by Vita-Food had no value, and no part of the total consideration paid by the petitioner under the contract of November 28, 1942, with Vita-Food is properly allocable to the purchase of these shares of stock.

In accordance with our findings of fact, it is held that \$75,000 paid by the petitioner to secure the cancellation of an onerous contract is properly deductible during the fiscal year 1943 as an ordinary and necessary business expense, and that \$122,700 which the petitioner was obligated to pay for the purchase of a trade-mark is a capital expenditure which is not deductible as an ordinary and necessary business expense.

Decision will be entered under Rule 50.

[U. S. Tax Court Seal.]

Received June 28, 1950.

Served June 30, 1950.

Entered June 30, 1950.

The Tax Court of the United States
Washington
Docket No. 12473

THE STUART COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determinations of the Court in its Memorandum Findings of Fact and Opinion entered on June 30, 1950, the respondent has filed recomputation of the liability of the petitioner for taxes, with which the petitioner agrees. Accordingly, it is

Ordered and Decided: That there are no deficiencies in income tax, in declared value excess profits tax, or in excess profits tax for the fiscal year ended March 31, 1943; that there is a deficiency in excess profits tax for the fiscal year ended March 31, 1944, in the amount of \$1,507.08; and that there are deficiencies in income tax, in declared value excess profits tax, and in excess profits tax for the fiscal year ended March 31, 1945, in the amounts of \$10.79, \$6,591.80, and \$67,535.53, respectively.

[Seal] /s/ MARION J. HARRON,
Judge.

Entered September 22, 1950.

Served September 26, 1950.

The Tax Court of the United States
Docket No. 12473

THE STUART COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

January 28, 1948—10:00 A.M.

(Met pursuant to notice.)

Before: Honorable Marion J. Harron,
Judge.

Appearances:

A. CALDER MACKAY,
ARTHUR MCGREGOR, and
F. EDWARD LITTLE,
728 Pacific Mutual Building,
523 West Sixth Street,
Los Angeles, California,
Appearing for the Petitioner.

R. E. MAIDEN,
(HONORABLE CHARLES OLIPHANT,
(Chief Counsel, Bureau of Internal Revenue),
Appearing for the Respondent.

PROCEEDINGS

The Clerk: Docket No. 12,473, The Stuart Company.

Mr. Mackay: Ready for the Petitioner, A. Calder

Mackay, Arthur McGregor and F. Edward Little appearing for Petitioner.

Mr. Maiden: Ready for Respondent, R. E. Maiden.

The Court: You may proceed.

Mr. Mackay: Your Honor, at this time we should like to file a motion to amend the petition and also the amended petition attached thereto. Counsel has been submitted with a copy to this, and I understand there is no objection, and I am filing the required copies.

The Court: Without objection, the copies may be received. Counsel is given the stipulated time to file the answer.

Mr. Maiden: If your Honor please, I have my amended answer here now.

The Court: The amended answer is received.

Opening Statement on Behalf of the Petitioner

By Mr. Mackay:

Now, if your Honor please, The Stuart Company, Docket No. 12,473, comes before this court by reason of proposed deficiencies made by the Commissioner of Internal Revenue in income, declared value excess profits taxes and excess profits taxes for the fiscal year ending March 31, 1943, [3*] 1944 and 1945 in the following amounts: Income taxes, \$2,020.94; declared value excess profits taxes, \$6,855.50, and excess profits taxes, \$128,591.43.

Now, if your Honor please, the deficiencies arise largely because the Respondent disallowed as deductions expenditures made by Petitioner during

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

the years involved in consideration of the cancellation of an onerous contract.

Our evidence will show that on or about May 5, 1941, Arthur Hanisch, individually, Petitioner, The Vita-Food Corporation and Shaler Food Products Company entered into an agreement under the terms of which The Vita-Food Corporation was to manufacture and Petitioner was to sell and distribute certain vitamin concentrates to be known as "the Stuart formula." Petitioner agreed to purchase only from The Vita-Food Corporation and to sell at prices fixed by The Vita-Food Corporation.

Now, in this contract, if your Honor please, the Shaler Food Products Company is mentioned. That company was organized and was part of this contract to sell vitamin products under the name of "Vitaplex" to the grocery stores. It was merged into Petitioner in July, 1942.

Now, our evidence will show that the operations under the above-referred-to contract were never satisfactory or profitable to Petitioner. Chiefly, the pricing arrangement did not permit Petitioner to make a satisfactory profit. The [4] result of Petitioner's operations will be presented to the Court and it will show that notwithstanding the fact that no salary or compensation was paid to Mr. Hanisch, who financed and managed Petitioner's operation, the company nevertheless suffered losses or made very little profit at any time prior to the time of the cancellation contract, which I shall later refer to, and which was dated November 28, 1942.

Our evidence will show that Mr. Hanisch did not

take a salary because one of his main purposes for going into this business was to provide vitamins at a price that would make them available to the masses of people, for at that time the principal vitamin product was selling at \$4.75 a pint—too high for the average person to obtain.

Our evidence will show that Mr. Hanisch had been ill for a number of years with tuberculosis and he had been going from sanitarium to sanitarium, and that in 1940 he met Dr. Borsook of the California Institute of Technology who was the head of the nutritional department. Dr. Borsook interested him in the possibility of supplying vitamins to the masses at a price which they could afford or pay or buy.

Our evidence will show that the Vita-Food Corporation was guilty of misrepresentations as to the quality and nature of its product, as to its research facilities and its ability to produce, its financial ability and also its [5] secret process.

Our evidence will show that it had no secret process to make this product. Now, at the time of the execution of the agreement representations were made by Vita-Food that the vitamin product had been developed in the laboratory of the California Institute of Technology, which Mr. Hanisch later found to be false.

Our evidence will show that the product was not stable as had been represented; that the product in liquid form was ill-tasting and had a tendency to ferment, which frequently caused bottles to explode on the dry store shelves and in doctors' offices.

In September, 1942, it was discovered by Mr. Hanisch, president of the Petitioner, The Stuart Company, that superior products could be obtained elsewhere under more favorable circumstances and at a much lower cost.

As a result of this situation, disputes arose and relations between the parties became quite strained. Notice of termination of the contract was given by the Petitioner and Vita-Food Corporation claimed that Petitioner could buy only from Vita-Food. Complaints were drawn up and litigation was threatened by both sides. Vita-Food completed its complaint first and filed it in the Superior Court.

Our evidence will show that both parties claimed ownership of the trade-mark, "the Stuart [6] formula."

Our evidence will show that the name "Stuart" in the formula was the name of Mr. Hanisch's son; also that the products sold by Petitioner, while containing the label bearing the trade-mark, "the Stuart formula," were sold as products of Petitioner and not as the products of The Vita-Food Corporation.

The evidence will show that an application for the trade-mark was filed in September, 1942, by Vita-Food, but it was, as our evidence will show, invalid because of misstatements in the application, and that Mr. Hanisch at that time had procured the opinion of patent attorneys to that effect.

Now, immediately upon filing its complaint The Vita-Food Corporation, as our evidence will show, requested a conference looking to the settlement of

their differences. Conferences were held, and as a result of protracted negotiations a contract dated November 28, 1942, was entered into, and this was the contract, if your Honor please, under which the sums of money, \$197,000.00, were expended by the taxpayer during these years and which the Commissioner of Internal Revenue has treated as part of the purchase price of assets and not as ordinary expenses.

Now, if your Honor please, the contract of November 28, 1942, which is between The Vita-Food Corporation on the one hand and The Stuart Company and its principal stockholder, Mr. Hanisch, on the other hand, is designated—and I quote: [7] “Agreement of Settlement of Litigation and Cancellation of Contract.”

The contract recites briefly: “That there is a suit pending in the Superior Court between the parties; that the parties desire to settle all their differences.”

The contract further recites that the parties claim ownership in the trade-mark, “the Stuart formula.”

The contract provided among other things that the suit pending would be dismissed with prejudice; that the prior agreement between the parties, dated May 5, 1941, would be cancelled and terminated. The agreement also provided that the parties would waive and release each other from any and all claims and demands of every kind, character or description which any thereof have, or may have or claim to have against thereof.

The contract further provided that the Vita-Food Corporation would quitclaim without warranty to

The Stuart Company the trade-mark, "the Stuart formula." It also provided that the Stuart Company and Mr. Hanisch would pay to Vita-Food Corporation the sum of \$75,000.00 as follows: \$35,000.00 immediately, the balance of \$40,000.00 in monthly installments of \$4,000.00 each.

The contract under the agreement provided that The Stuart Company agreed to pay Vita-Food Corporation—"on a royalty basis and as additional consideration for the [8] execution of" the settlement agreement the sum of \$122,700.00. This sum of \$122,700.00 was agreed to be paid "at the rate of 7½ cents per unit of vitamin concentrates as sold" by The Stuart Company "beginning October 1, 1943, and continuing until the said sum of \$122,700.00 is fully paid."

Now, the contract, if your Honor please, defined what was designated as a unit of vitamin concentrates which agreed to be "the equivalent of one pint or 96 tablets of the product now being sold and marketed under the trade-mark of 'the Stuart formula' at the potencies now in effect in the Stuart formula liquid."

The contract further provided that the payments shall be paid on the equivalent of the said unit of vitamin concentrates whether the same shall hereafter be sold and marketed in liquid, tablet or in any other physical form or whatever the size of the package was packaged by second party, The Stuart Company, and here is the significant thing—whether sold under the trade-mark, "the Stuart formula," or not. In other words, the money was to be paid

irrespective of whether or not it was sold under the trade-mark, "the Stuart formula."

The contract further provided that if Mr. Hanisch should at any time fail to maintain his stock ownership and control of at least 51 per cent in the petitioner or should fail up to and including October 15, 1946, to continue as the [9] managing agent of The Stuart Company, then, in either such event he, Mr. Hanisch, would forthwith pay to Vita-Food Corporation the then remaining balance of the \$40,000.00 as well as the remaining balance of the sum of \$122,700.00.

The contract further provided that if The Stuart Company should sell its business, good will or sell or license the trade-mark, "the Stuart formula," the balance should be forthwith paid to Vita-Food Corporation.

I want to call your Honor's attention to one significant provision in the contract, as our evidence will show, which we believe the Commissioner of Internal Revenue has misunderstood. The contract provided that in the event of the abandonment of the trade-mark, "the Stuart formula," by the Stuart Company, that all registrations thereof shall vest in Vita-Food Corporation. It is our position here, if your Honor please, that the parties attached little importance to the trade-mark at that time. After all, it had been in existence only a short time, and if there was to be an abandonment of that, that it should vest in The Vita-Food Corporation, and without consideration.

Now, if your Honor please, our evidence will show that the Petitioner contemplated abandoning this trade-mark, and as a consequence, after the contract was written up the opposing contracting parties insisted to make an insertion requiring that if the abandonment had been made, it should then [10] vest in The Vita-Food Corporation.

Our evidence will show that after the signing of the settlement contract and the cancellation of the contract of May 5, 1941—well, I want to say this: Our evidence will show, if your Honor please, that the product they represented they had had considerable defects in it. It was a product containing multiple vitamins, but it had a molasses base, and the doctor found, and the consuming public also, that molasses would ferment and explode the bottles in the doctors' offices, as well as in the drug stores.

I may say that the manner of marketing this product wasn't through advertising in newspapers and advertising to the ultimate consumer. The Stuart Company proceeded along what is known as the ethical method of distributing and selling this product, that is to say, it advertised only in medical journals and sent samples to doctors and sent trained men to explain the product to the doctors. I mention this fact, if your Honor please, because I think it is unlike a trade-mark where you get a lot of advertising to the general public and it develops in the general public what it is. This particular product, as I say, went through the ethical route to the doctors who were the ones who prescribed its use.

Now, our evidence will show that the value of the Stuart product in its origination was not based upon the name itself, but the fact that Mr. Hanisch, through his sales [11] promotion efforts and the additional fact that he sold state quantities of vitamins at a much cheaper price than anybody else in the field, produced the volume of sales that he enjoyed at that time.

Our evidence will show that anybody could have produced a similar product under a similar sales promotion. Vitamins as such and as contained in the Stuart product were available to any manufacturer of vitamin products, and vitamins were bought with the idea of how many units could be obtained for a given amount of money.

Now, I may say, if your Honor please, and I want to emphasize this in my statement, that Galen B was the outstanding product being sold. That was being sold for \$4.75 a pint, too high for the masses to get.

The Stuart Company was required to sell and did sell its product for about \$1.95.

Now, if your Honor please, our evidence will show that the payments that were made here, pursuant to this contract, were made to cancel the onerous contract, that therefore they constitute ordinary and necessary expenses. This Court has held that in many cases, and I refer your Honor to the Community Bond & Mortgage Corporation case which was decided by the Board of Tax Appeals in 27 B.T.A. 480, which was affirmed in 74 F. (2d) 727. [12]

The Court: Mr. Mackay, has the Respondent allowed any deduction in each of these taxable years with respect to these payments?

Mr. Mackay: No, your Honor, he has not.

The Court: Well, if he pleaded the payments as a capital item instead of ordinary expense, wouldn't he have allowed something?

Mr. Mackay: Well, if your Honor Please, he disallowed all of them as deductions, and I assume he did it on the ground that—on his interpretation of the contract, that The Stuart Company had acquired this Stuart formula and had paid it for that, and there is no deduction allowed for the amortization of a trade-mark.

The Court: Well, I wanted to know what your understanding of the Respondent's determination is. That isn't clear from your statement.

Mr. Mackay: Well, my understanding is, if your Honor please, that he, the Respondent, has concluded that under this settlement agreement the entire \$197,000.00, which was paid represents the cost of acquisition of assets, principally, as I understand it, the Stuart formula, and that no part of that is deductible. Our position is the whole amount is deductible.

The Court: Why do you say the whole amount is deductible? [13]

Mr. Mackay: Because it is in the cancellation of an onerous contract. The contract was cancelled, the contract of May 5, 1941.

The Court: In other words, the Petitioner's

theory and the Respondent's theory are very far apart, then, is that right.

Mr. Mackay: Very far apart.

The Court: The difference between a theory that an expenditure is an investment in an asset and the theory that an expenditure is a payment in order to get out of or cancel an unsatisfactory contract?

Mr. Mackay: That is right, your Honor.

The Court: They are certainly two very different concepts.

Mr. Mackay: That is right, your Honor.

The Court: Now, what have you set forth in this amended petition, Mr. Mackay?

Mr. Mackay: I have two other small issues in here which relate to the amendment. The amendment relates to the postwar credit refund, just the refund credit for postwar under the Case of Altschult's Incorporation versus Commissioner, Docket No. 12317 T C No. 94, decided October 15, 1947. If I may be permitted, there are just two small issues——

The Court: I don't understand what this item is, Mr. Mackay. Is this a new claim raised now for the amended [14] petition for the first time?

Mr. McGregor: If your Honor please, the issue has to do with the invested capital item for the fiscal years ended March 31, 1944, and March 31, 1945, the amount of postwar credit determined for the previous two years, it should be noted that the Respondent in its 90-day notice of deficiency determines an excess profits tax for the fiscal year ended

March 31, 1943, of \$8,495.95, which results in a postwar credit of \$849.60, and for the year ended March 31, 1944, excess profits taxes of \$52,808.66. The postwar credit for these two years would be \$849.60 and \$5,280.87, respectively, which under the recent case of *Altschult's Incorporation versus Commissioner*, citation given, constitutes earnings and surplus at the beginning of the respective years as part of Petitioner's capital for excess profits tax purposes. They are on the invested capital basis for determining their excess profits credit.

The Court: Well then, this second issue relates to the amount, the excess profits credit, is that correct?

Mr. McGregor: That is correct.

The Court: In what years?

Mr. McGregor: 1944 and 1945.

The Court: Well, when the taxpayer computed its excess profits credit it did not take something into account?

Mr. McGregor: They didn't do that because they didn't [15] show any of this large excess profits tax which the Commissioner has determined, but it has been ruled in this case cited that the excess profits——

The Court: Let me ask you this: Is this an alternative contention?

Mr. McGregor: Yes, it will be an alternative. If Petitioner wins in his case, this will have no effect.

The Court: There would be a credit whether the

rule in the cited case Altschult's Incorporation versus Commissioner, would apply; is that correct?

Mr. McGregor: That is right. I think that that is a credit, that the taxpayer gets on the 10 per cent of the excess profits.

The Court: That is evidently what the rule of that case is, but whether you can properly import that into this case is something you have to establish. You are now raising that question in the amended petition?

Mr. McGregor: I believe that the Commission under Rule 50 would automatically take it into consideration and allow it. I don't know.

The Court: That is why I want to have this discussed at this time, because I think you had better have some understanding about that, otherwise you will have to establish that would properly follow in this case.

Mr. McGregor: Well, your Honor, the facts in the [16] case—the 90-day letter shows what the excess profits should be, and it shows the computation of the invested capital and it shows that this 10 per cent of the excess profits tax credit for each of these two years has not been taken into invested capital to allow their excess profits credit for the subsequent years. I think the record will speak for itself upon that.

The Court: No, if you are going to raise a new issue in your amended petition, an alternative issue, of course, you raise it and you have to establish it at the trial unless counsel for the Respondent agrees

that it is a matter that will be automatically taken care of under Rule 50.

Now, if you haven't done that up to the present time, you had better find out about it before you end the presentation of your case.

Mr. McGregor: Well, your Honor, we will see what he says with respect to the amended petition. If he admits the facts on those issues, we don't have to prove anything further. I haven't had a chance to read the answer yet.

The Court: Is anything else raised in your amended petition?

Mr. McGregor: Yes. The other issue has to do with respect to Respondent failing to allow as a credit to the excess profits tax determined for the fiscal years [17] ending March 31, 1943, and March 31, 1944, the postwar refund credit of excess profits taxes. It should be noted that the Respondent's notice of determination shows an excess profits tax liability for the year ended March 31, 1943, of \$8,495.95, and for the fiscal year ended March 31, 1944, of \$52,808.66, but fails to allow the postwar refund credit against such excess profits taxes in the sum of \$849.60, for the fiscal year ended March 31, 1943, and of \$5,280.87, for the fiscal year ended March 31, 1944, as required by Internal Revenue Code Sections 780, 781 and 784, although the Respondent has computed postwar credit refund for the fiscal year ended March 31, 1945. He does it one year, but not in the other two years.

By reason of this fact the Respondent has overstated the deficiency for the fiscal year ended March

31, 1943, of \$849.60, and for the fiscal year ended March 31, 1944, of \$5,280.87.

The Court: Is it just an error? Would the Respondent concede that it was just an error?

Mr. McGregor: Well, I don't know. It is a new tax, and they have had somewhat of a complicated way of treating it one time during the period. They would not make that refund credit through the Collector's office on additional taxes. I think that was modified, so later I think the 1946 Act or the 1945 Act permitted that refund of credit to be [18] made in the computation of the tax.

Now, they have done that with one year, but they didn't do it in the other two years. Now, I don't know of the cause for it.

The Court: Well, didn't you try to ascertain before the trial?

Mr. McGregor: I beg your pardon?

The Court: Didn't you try to find out before the trial of the case?

Mr. McGregor: Well, we did submit a stipulation of facts on this to counsel, but they have been so busy they couldn't get it checked to sign it.

The Court: That isn't what I asked you. I said didn't you find out prior to the trial why that credit had not been allowed in the earlier years?

Mr. McGregor: No, we did not, your Honor.

The Court: Now, are you relying simply on a regulation on this point or is there some amendment to the statute that you are relying on?

Mr. McGregor: I am relying strictly on the code

sections that I quoted, Sections 780, 781 and 784 which provide for that. [19]

Opening Statement on Behalf of the Respondent
By Mr. Maiden:

May it please the Court, the paramount issue in the case, and the one issue that accounts for the bulk of the deficiencies set up in the statutory notice is the one issue of whether payments made by this Petitioner to The Vita-Food Corporation under a document dated November 28, 1942, constitute payments made for the acquisition of a trade-mark called "the Stuart formula," or whether they represent payments as claimed by the Petitioner in consideration of the cancellation of a so-called onerous contract of May 5, 1941.

Now, briefly on that issue, if the Court please, the May 5, 1941, contract which was a contract whereby The Vita-Food Corporation was to sell to The Stuart Company at certain fixed prices vitamin concentrates to be sold and distributed by The Stuart Company under the trade name of the Vita-Food Corporation, specifically under the trade name of The Stuart formula. This contract provides specifically in Paragraph 2 that "The Stuart Company, one of the first parties, agrees that the concentrate received by it under said contract of March 7, 1941, will be sold and distributed under second party's trade-mark—" the second party being The Vita-Food Corporation—"or labelled 'The Stuart Formula,' and/or under such other second party's trade-marks or labels as may be mutually agreed upon by first and second parties." [20]

I might state that the contract of March 7, 1941, referred to in the May 1st contract was simply a letter sent to the Stuart Company—I mean, sent to Mr. Hanisch, I believe, by the Vita-Food Corporation, whereby it sets out that Mr. Hanisch was buying 3,000 gallons of this concentrate, and that it was understood that Mr. Hanisch would have two corporations organized, The Shaler Food Products Company and The Stuart Company, and that these two corporations would sell to the public this vitamin concentrate.

Now, not only does Paragraph 2 provide that the trade-mark The Stuart Formula is the property of The Vita-Food Corporation, but Paragraph 10 of the contract further provides, “Any and all trade-marks or labels under which the concentrates hereinbefore specifically described or any other products manufactured by second party which may hereafter be marketed or distributed or offered for sale by first party or either thereof, shall at all times be and remain the sole and exclusive property of second party—” the second party being The Vita-Food Corporation.

Now, if it please the Court, the proof will show in this case that the trade-mark “the Stuart formula” was, pursuant to the specific provisions of the contract of May 5, 1941, registered by The Vita-Food Corporation both in the State of California and at Washington.

Paragraph 20 provides that “Second party agrees to [21] comply with all governmental regulations as applied to it and to the manufacture of products

sold to first parties. Second party agrees further to apply for registration of trade names hereinbefore specifically mentioned—" one of them being "the Stuart formula," the trade-mark involved in this case— "and will likewise apply for registration of such trade names as may be mutually agreed upon covering future products which may be developed or manufactured by second party."

Now, if the Court please, this contract of May 5, 1941, provided that, under Paragraph 6, that the Stuart Company should have the exclusive right to sell the vitamin concentrates under The Stuart Formula or the trade name of The Stuart Company, but provided that in the event The Stuart Company failed for any 60 consecutive days to meet a minimum quota of purchases from Vita-Food, that then and in that event Vita-Food Company could serve a notice of cancellation of the contract, that the notice of termination of the contract would not become effective for 60 days after the service of the notice, during which time The Stuart Company could keep alive the contract by making up the deficiency in its quota agreement of purchases from Vita-Food Corporation.

There is a similar provision for termination of the contract contained in Paragraph 19. [22]

Now, if the Court please, in order to keep the chronology of facts, I want to state that The Vita-Food corporation on the 23rd day of June, 1942, registered this trade-mark in its name, that is, the trade-mark "the Stuart formula" with the Department of State for the State of California, and be-

came the registered owner of the trade-mark in the State of California. Thereafter on September 8, 1942, it received the registration in its name of this trade-mark "the Stuart formula" from the United States of America. Now, if the Court please, the evidence in this case as the Respondent will develop it will show that the Vita-Food Corporation would have been glad at any time to have cancelled without one dollar from The Stuart Company the contract of May 5, 1941. Under the contract of May 5, 1941, The Vita-Food Corporation was committed to sell all of its products through The Stuart Company, and only in the event of a cancellation of that contract could The Vita-Food Corporation sell its products through any other agency or distributor.

The facts will likewise show that certainly as early as the summer of 1942, that The Stuart Company commenced efforts to obtain title to this trade-mark "the Stuart formula" by direct offers of purchase to The Vita-Food Corporation.

The evidence will show that The Stuart Company first offered to pay \$15,000.00, for this trade-mark, that it [23] then raised that offer to approximately \$50,000.00, that it then raised the offer to approximately \$85,000.00 to \$100,000.00; all of which offers were rejected by The Vita-Food Corporation.

The evidence in the case will show that at no time during the existence of this agreement of May 5, 1941, did The Stuart Company meet its minimum quota purchases from The Vita-Food Corporation,

and that The Vita-Food Corporation from time to time waived the failure of The Stuart Company to come up to the quota purchases set forth in the contract, and that the purpose of the waiver was to enable The Stuart Company to properly develop this product and to give it a full and complete opportunity to make good under the contract and to derive the benefits of the profits expected from the sale of the product.

However, in the summer of 1942, Mr. Lewis of The Vita-Food Corporation—and I might state that Mr. Lewis was the moving spirit in and behind The Vita-Food Corporation and that he at all times spoke for and handled all of these transactions for The Vita-Food Corporation—Mr. Lewis had a conference with Mr. Hanisch, and Mr. Hanisch was——

The Court: Isn't this all matter that has to be proved, Mr. Maiden?

Mr. Maiden: I beg your pardon?

The Court: This is all matter that has to be proved? [24]

Mr. Maiden: It is, your Honor. Mr. Mackay put his interpretation upon the facts he wanted to prove, and I was sort of following suit.

The Court: Well, it has taken one hour, almost, for the opening statements. If we are to conclude the trial of the case, and I understand that it will take a day, I think we must get down to hearing evidence.

Mr. Maiden: Yes, ma'am.

The Court: May I ask you, please, now to bring your opening statement to a conclusion, and also

please take up the matter of the two matters mentioned by Mr. McGregor and which are evidently covered by the amended petition which seem to call for an adjustment of some kind rather than the introduction of evidence and the argument of the legal right of the Petitioner to the adjustment. I don't know what these two alternatives are.

Mr. Maiden: Briefly, in closing up the first issue, I do want to mention the fact that on October 8, 1942, the Vita-Food Corporation served notice of cancellation of this contract on The Stuart Company. On October 12, 1942, The Stuart Company acknowledged receipt of that notice and stated that they would try to bring up their quota, but that they doubted if they would be able to do so, and then advised The Vita-Food Corporation that they would not accept the reinstatement of the contract. On November 23, 1942, The Stuart Company served a [25] notice of rescission of the contract setting up it had been obtained under fraud and various other statements. On November 25, 1942, The Vita-Food Corporation filed an injunction suit in the Superior Court here in Los Angeles asking that The Stuart Company be enjoined from selling any vitamin concentrate products under the trade name of "the Stuart formula."

Then on November 28, 1942, the agreement of that date was entered into, and it is Respondent's contention in this case that the only real substance to that agreement was the acquisition for the full purchase price set forth therein of this trade-mark "the Stuart formula."

Now, if the Court please, on the little interest deduction issue, the Petitioner is claiming now for the first time no such deduction was made in its return, and, of course, it is not mentioned in the statutory notice that it is entitled to a deduction of some two thousand dollars.

Mr. Mackay: We are waiving that.

Mr. Maiden: Fine. Then that brings us to the remaining issue which is raised for the first time on the amended petition, and that is the right of the Petitioner to have included in the determination of its invested capital——

The Court: Now, let me just ask you to stop again. Why repeat all of that? I want to know what the Respondent's position is on the claims, or haven't you any position at [26] this time?

Mr. Maiden: Your Honor, I am inclined to believe that this case of Altschult's controls the issue in this case on that point.

The Court: Well, do you know yet or don't you? You say you are inclined.

Mr. Maiden: Well, I wouldn't be positive about any matter of law, if the Court please, without——

The Court: Very well, we will pass the matter. You are not in a position now to state—I don't want to repeat the word "position"—but I will do that, anyway—Respondent is not prepared at this time to answer the Petitioner on the propriety of these two alternative claims, is that correct?

Mr. Maiden: That is right, your Honor.

The Court: Then I will ask counsel during the recess, which we will take, to go over this matter so

that the Court will know whether we are going to hear evidence on one issue or three issues, because this is quite unusual. Ordinarily we know at the beginning of the trial whether we are going to hear evidence on one issue or several issues. We also know where the parties have been agreed and what can be followed under Rule 50.

Now, if you haven't worked that out up to the present time, I shall ask you to work that out and report [27] back sometime during the day, or at least before the record in this hearing is closed.

Now, let's just drop that and proceed, please, because we are not making any headway with our offering in the hearing of evidence.

Mr. McGregor: I might call the Court's attention to the fact that one of these issues was a case just tried on the last call of the calendar on the California Vegetable Concentrates.

The Court: Well, I pointed that out because it is a matter that counsel should be able to agree on during the trial and you haven't done so yet, and I would much prefer that you do that before the conclusion of the hearing rather than merely state that you think the Altschult's case will apply. I don't know and you don't know whether it will or not. It makes it too difficult when briefs are filed to find out that there was an issue that wasn't tried, and it has to be worked out by the Court in some way when the briefs are filed. You know that these briefs that are filed by the government have to go back to Washington, they have to be reviewed, and it is my

experience that loose ends of this kind can cause a lot of trouble.

Can we pass this now?

Mr. McGregor: In my opinion it should be worked out under Rule 50. [28]

Mr. Maiden: May I say——

The Court: May I have the last word, gentlemen? I have said this three times, you haven't up to the present time consulted with each other on it. The Court wants you to consult with each other on it during the trial of the case, and not wait until you get to the Rule 50 recomputation which may be made eight months from now. Do you understand that, Mr. McGregor?

Mr. McGregor: Yes, your Honor.

The Court: All right. Let's be in agreement on that.

Are you ready to proceed with the evidence?

Mr. Mackay: Yes, your Honor.

May I call for the returns for the fiscal years 1942, '43, '44 and '45?

Mr. Maiden: You may, and here they are, Mr. Mackay.

Mr. Mackay: You handed me, counsel, the returns for 1943, 1944 and 1945, but not for 1942. I understand you do not have it?

Mr. Maiden: I do not have it for 1942, and I have agreed that you might put in for 1942 your copy of that return and I would raise no objection.

Mr. Mackay: It is agreed that these may be withdrawn and photostats substituted?

Mr. Maiden: If it is agreeable with the [29] Court.

Mr. Mackay: I would like to offer these in evidence.

The Court: How do you want them marked, Mr. Mackay?

Mr. Mackay: May they be marked consecutively?

The Clerk: There are five separate documents.

The Court: Well, Mr. Mackay, we could make the return for 1945 No. 1, or we could make it Exhibit 5.

Would you mind offering them, please?

Mr. Mackay: Yes, your Honor.

I should like to offer the returns here which are for the fiscal year 1941, the corporation excess profits tax return as well as the corporation income and declared value excess profits tax return as one exhibit.

The Court: Whose return is that?

The Clerk: The Stuart Company, if your Honor please.

The Court: It is received as Exhibit No. 1 with leave to withdraw the document and substitute a photostatic copy.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 1.)

Mr. Mackay: I should like to offer in evidence, if your Honor please, a similar return for the year 1943 as Exhibit No. 2.

The Court: It is received as Exhibit No. 2.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 2.) [30]

Mr. Mackay: As Exhibit 3, I should like to offer in evidence similar returns for the fiscal year ended March 31, 1944.

The Court: It is received as Exhibit No. 3.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 3.)

Mr. Mackay: As Exhibit No. 4, similar returns for the year ended March 31, 1945.

The Court: It is received as Exhibit 4.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 4.)

The Court: Is that four returns, Mr. Clerk?

The Clerk: I have four returns, your Honor.

The Court: You may proceed.

Mr. Mackay: Mr. Ferguson, please.

Whereupon,

HOWARD FERGUSON

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you tell us your name, Mr. Witness?

The Witness: Howard Ferguson.

Direct Examination

By Mr. Mackay:

Q. What is your occupation, Mr. Ferguson?

(Testimony of Howard Ferguson.)

A. Certified Public Accountant. [31]

Q. You are practicing in Pasadena, are you?

A. Pasadena and Alhambra.

Q. I see. Are you familiar with the books and account of The Stuart Company?

A. Yes, I am.

Q. Are you employed by them?

A. No, I am not.

Q. Have you been? A. No, sir.

Q. Well, recently have you been employed to make a summary or schedule showing the payments made under the agreement of November 28, 1942.

A. Yes.

Q. I will ask you if the books of account are in court. Are the books of account of The Stuart Company in court? A. Yes, they are.

Q. I will ask you if you prepared this statement showing how the payments were reflected on the books under the agreement of November 28, 1942.

A. Yes, I prepared this.

Q. From the books of account? A. Yes.

Q. Are they correct? A. Yes, sir.

Mr. Mackay: If your Honor please, I would like to [32] offer this in evidence.

Mr. Maiden: No objection, if the Court please.

The Court: That is a schedule of payments made under what agreement, Mr. Mackay?

Mr. Mackay: Under the agreement of November 28, 1942. That was the settlement agreement.

The Court: By The Stuart Company?

Mr. Mackay: By The Stuart Company.

(Testimony of Howard Ferguson.)

The Court: To The Vita-Food Corporation?

Mr. Mackay: To The Vita-Food Corporation.

The Court: It is received as Exhibit No. 5.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 5.)

Mr. Mackay: Now, if your Honor please, the returns are in, but in order to assist in understanding this case, I should like to introduce here what are The Stuart Company balance sheets to the tax returns. I think it would be a whole lot easier for the Court to see the loss and so on. I understand counsel has no objection.

Mr. Maiden: No objection.

The Court: It is a schedule showing comparative balance sheets taken from the tax returns of the years 1942 to 1945, inclusive, and is received as Exhibit No. 6.

(The documents above referred to were received in evidence and marked Petitioner's Exhibit No. 6.) [33]

Mr. Mackay: Now, if your Honor please, I call your attention to the fact that this agreement under which these payments were made is dated November 28, 1942. It became necessary, in our opinion, that we show the earnings of the company from March 31, 1942, the close of its last fiscal year, to October 31, 1942, which was the last full month before the date of the contract.

(Testimony of Howard Ferguson.)

Q. (By Mr. Mackay): I will ask you, Mr. Witness, if you prepared the statement of profit and loss as adjusted by proper accruals?

A. Yes, I did.

Q. Did you prepare that from the books of account?

A. Well, there are two periods covered. For the year ended March 31, 1941, that was taken from the tax return. For the seven months ended October 31, 1941, that was taken from the books as adjusted.

The Court: Why did you do that? Why did you take it partly from the tax returns and partly from the books?

The Witness: Well, your Honor, the short period of course, could not be reflected on the tax return. For the earlier period we took them from the tax return because that has been submitted in evidence.

The Court: I see. What was the fiscal year of the Stuart Company?

The Witness: March 31st. [34]

The Court: The end of March 31st?

The Witness: Yes.

Q. (By Mr. Mackay): Now, you spoke about, Mr. Witness, some adjustments here. Will you please explain to the Court what adjustments you made?

A. Yes. From month to month at that time the Stuart Company did not accrue all of its expenses each month. They kept a record of their sales and cost of sales, but as to accruing interest and work-

(Testimony of Howard Ferguson.)

nary expenses, that was not done each month. This is done at the year end, and for the purposes of having a comparable statement for the short period here at October 31st, I did make certain adjustments.

Q. Did you prepare a statement showing those adjustments? A. Yes.

Mr. Mackay: If your Honor please, I should like to offer in evidence this statement which is entitled "Statement of Profit and Loss as Adjusted by Proper Accruing."

Mr. Maiden: There will be no objection to this, if your Honor please. I consider all this evidence is immaterial.

The Court: Received as Exhibit No. 7.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 7.)

Q. (By Mr. Mackay): Now, did you prepare a statement stating the [35] adjustments you just testified to? A. Yes.

Mr. Mackay: If your Honor please, I should like to offer these in evidence.

Mr. Maiden: No objection, if the Court please.

The Court: Adjustments of what? Why do you want to introduce a schedule showing adjustments? Let me see Exhibit 7, please.

Well, Exhibit 7 is just for one year, Mr. Mackay.

Mr. Mackay: Yes, that is all we are trying to do, your Honor, is to show the earnings from the end of the last fiscal year up and including October 31, 1942.

(Testimony of Howard Ferguson.)

The Court: What about the earnings for the previous years?

Mr. Mackay: Well, we have already got those in evidence.

The Witness: Your Honor, could I explain?

The Court: What are these adjustments?

Mr. Mackay: Would you explain them?

The Court: You had better explain it into the record. If you are going to explain it now, I won't understand it later. You can refer to the document that is marked as Exhibit 7.

The Witness: Exhibit 7 shows the operating loss for the year ending March 31, 1942, per the tax return. That [36] was the first fiscal year, the first full year of the Stuart Company. They were incorporated at the end of March, 1941, and they opened their books of account as of April 1st, so this does take us back to the inception of the Stuart Company. Does that answer the question?

The Court: Yes. That wasn't clear before. Now, about the adjustments.

The Witness: The adjustments made for the seven months ended October 31, 1942, were the two major ones. There could have been very small items for depreciation and payroll tax, but the two major items are \$3,054.08 as interest accrued on notes payable. That was interest from April 1, 1942, to October 31st.

The Court: What is the difference in your final figure?

The Witness: Well, that is reflected in the loss

(Testimony of Howard Ferguson.)

of \$8,989.42 for the seven months ended October 31, 1942.

The Court: As shown on Exhibit 7?

The Witness: Yes.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

Mr. Mackay, your schedule that you have just offered is impossible to understand. It doesn't jibe with Exhibit 7. It doesn't explain anything in Exhibit 7. It [37] apparently shows adjustments made to book figures. Well, the book figures are not in evidence, so it means nothing. It is an adjustment which pre-supposes a comparison, and if you don't have two comparatives to show one, it means nothing. You have got to show both. That doesn't show any change in any total figures of loss for these two periods. As shown on Exhibit 7, for example, those adjustments may have been taken into consideration in computing the loss for the first fiscal year and for the first seven months.

Now, let me ask you another question, Mr. Witness. You say this corporation was organized in 1941 and opened its books on April 1, 1941, is that correct?

The Witness: That is correct.

The Court: So its first year ended on March 31, 1942?

The Witness: That is correct.

(Testimony of Howard Ferguson.)

The Court: Your gross profit and loss for the first full year is shown on Exhibit 7?

The Witness: That is correct.

The Court: Now, why were you asked to compute, if you know, the gross profit and loss for 10 months, January 1, 1942, to October 31, 1942? What is the significance of that? That is part of the first fiscal year and part of the second fiscal year, isn't it?

The Witness: No. There is a little misunderstanding, [38] if I may say so. The seven months ended October 31, 1942, would be from April 1, 1942, to October 31, 1942.

The Court: I thought it said 10 months.

The Witness: No, it is seven months, your Honor.

The Court: Well, why were you asked to give the gross profit and loss for part of the first fiscal year, do you know?

The Witness: Yes, because that was the closing of the month just preceding this cancellation contract of November 28, 1942.

Mr. Maiden: If the Court please, I object to the witness interpreting this contract as being a cancellation contract.

The Court: All right.

Mr. Mackay: I will accept that rebuke.

The Court: The witness isn't trying to interpret the contract.

Mr. Mackay: If your Honor please, I think I can clear that up for your Honor. It is our view

(Testimony of Howard Ferguson.)

in asking this witness this question—we have the statement for the first fiscal year, and we want to show the financial condition, the profit and loss for the last full month preceding the date of the agreement of November 28, 1942.

The Court: The last full month?

Mr. Mackay: Yes, your Honor—the seven months, I [39] mean, the seven months' operations including the last full month, because we couldn't include in this statement the earnings for November because they hadn't happened at that particular time.

The Court: Off the record, again, please.

(Discussion off the record.)

The Court: On the record. The Court does try to follow the evidence, and you have had that experience before.

Mr. Mackay: Yes, I have.

The Court: I can't figure out what you mean by your second column. I think you had better put dates on here, that is, April 1, 1941, to such and such a date, 1942. Then it won't be ambiguous.

Mr. Mackay: I think that is a good suggestion.

The Court: The first 10 months ending January 1, 1942?

Mr. Mackay: I think you are right, your Honor.

The Court: Well then, I was right in one of the questions, when I asked you if this last column relates to the first fiscal year—it relates to the second fiscal year.

(Testimony of Howard Ferguson.)

The Witness: That is correct, there is no overlap there at all.

The Court: All right. That clears that up.

Mr. Mackay: Now, if your Honor please, with Exhibit [40] 7 in here, this shows the operations for those seven months ending October 31, 1942, with certain adjustments. I understood the witness to say that there had been some items there that hadn't been accrued monthly as the months went by, and that is the reason I wanted to put in the next exhibit, the adjustments he made to the books.

The Court: I still can't understand them because you would have to introduce something to show what the book figure is worth that was adjusted, Mr. Mackay, otherwise I can't weigh it. I don't know what weight to give it.

Let me tell you what I mean here. Let me see that schedule again. The accountant made an adjustment in payroll tax expense which he has an Item 1 of \$250.28. I don't know what that left, what it was before or what it was after or what the net effect of that adjustment was. It is a small item. I wouldn't know what that did. There is an adjustment, Item 7 of expenses, sales expense—a lot about seven small items with a total of \$2,018.61. Well, it is an adjustment of what? Does it make the expenses increase or decrease? Does it make the loss figures shown on Exhibit 7 increase or decrease, and why is it material anyway?

Mr. Mackay: Well, for this reason, your Honor: We are contending, of course, that this trade-mark

(Testimony of Howard Ferguson.)

had no value at this particular time. In order to prove that——

The Court: These are the figures of the [41] Stuart Company, isn't that right?

Mr. Mackay: Yes, your Honor, that is right, and we were the only ones who marketed under the Stuart name. Therefore, it is necessary to show what earnings there were or whether or not any earnings could be attributed to the trade-mark from the time it operated under that form in May, 1941.

The Court: This company does not contend that it owned the trade-mark?

Mr. Mackay: My opening statement said that.

The Court: Have you proved that you own it?

Mr. Mackay: Well, the next witness——

The Court: Well, I think you will have to have this witness remain and not take him out of order. I don't know what you are getting at.

Mr. Mackay: All right, I will withhold this exhibit.

(Witness excused.)

Mr. Mackay: Call Mr. Hanisch.

Whereupon,

ARTHUR HANISCH

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you tell us your name, Mr. Witness, please?

(Testimony of Arthur Hanisch.)

The Witness: Arthur Hanisch. [42]

Direct Examination

By Mr. Mackay:

Q. Mr. Hanisch, what is your occupation?

A. I am president of the Stuart Company.

Q. How long have you been president of the Stuart Company?

A. Since its organization in March, 1941.

Q. What kind of business has the Stuart Company been carrying on since that time?

A. Distribution of vitamin products.

The Court: Mr. Mackay, I am going to interrupt here once, and then I will be finished. Please think of the psychology of the person who is listening to you.

Mr. Mackay: Thank you.

The Court: I don't know who the Stuart Company is, I don't know who the Vita-Food Company is. I listened to your opening statement very carefully. I know that it was general. Perhaps I am a little bit too methodical.

Mr. Mackay: No, I think not.

The Court: But to the Court, this is all a routine. It becomes very systematized, the matter of how the evidence is built up. I want to know who the dramatis personae of this story are. Who was the Stuart Company? Who owned the stock? How was it created? How much capital did it have when it was started? Who was the Vita-Food Corpora-

(Testimony of Arthur Hanisch.)

tion? [43] When was it organized? Who owned its stock? How much capital did it have?

If you will give me those basic things, first, and then get into what to you the interesting part of this matter is, I will be satisfied, but I will not be able to be patient and sit here unless I know what the under-pinnings of this structure are, because that is just the way my mind works. I have to know where the foundations are. Let's get into the basic facts, and then you can present your evidence in any way that you want, but I have to know what the relationships are, whether Vita-Food is partly owned by Stuart, for example; whether Stuart owns Vita-Food; or whether Vita-Food owns Stuart.

Mr. Mackay: I appreciate the suggestion, and I will bear that in mind.

Q. (By Mr. Mackay): Mr. Hanisch, will you please tell the Court when the company was organized?

A. The corporation was formed in the latter part of March, 1941.

Q. Do you know how much stock it issued?

A. \$1,000.00 in stock, and in addition to that, I guaranteed to loan the corporation working capital.

Q. Now, to whom was the stock issued?

A. The stock was issued to me, Mr. Pelletier, Mr. Lewis [44] and Mr. Pringle.

The Court: How many shares to each?

(Testimony of Arthur Hanisch.)

The Witness: There was a change later on, as I recall it.

The Court: No, how many shares originally?

The Witness: There was a thousand shares of a dollar each.

The Court: 1000 shares, \$1.00 each?

The Witness: That is right.

The Court: How many shares were issued to you?

The Witness: The thing was changed. I think at that time it was 60 per cent. At the present time I own 70 per cent. At the present time Mr. Pelletier owns 20 per cent and Mr. Pringle owns 10 per cent.

The Court: Mr. Lewis is out?

The Witness: That was an arrangement made at the time of the agreement of November, 1942.

The Court: It is a California corporation?

The Witness: Yes—now, I must explain—

The Court: What did you give for your stock? What did you turn into the corporation for the stock when it was issued to you?

The Witness: The cash of \$1000.00.

The Court: What did the others turn into the corporation for their stock? [45]

The Witness: Services. Mr. Pelletier went in on the basis to be a consultant with us. We had an operation in the grocery field, and I had no experience with it, so I wanted him in the corporation because I felt that he would be a very definite

(Testimony of Arthur Hanisch.)

asset, and they did help in the organization and in the formulation of our plans.

The Court: So the corporation was organized with \$1000.00 capital which you provided?

The Witness: That is correct. I must amplify that, however, your Honor, in that we had two corporations formed at that time. Now, that is the setup for the Stuart Company, but at the same time I formed another corporation, the Shaler Food Products Company.

The Court: That is not a party to this proceeding?

Mr. Mackay: No, your Honor, it is not a party to the proceeding, but it does have a bearing on it because the contract of May 5, 1941, does include the Shaler Company and that is the one that was cancelled by the agreement of November 28th, and the Shaler Company was merged in July, 1942, into the Stuart Company.

The Court: It was?

Mr. Mackay: Yes, sir. [46]

The Court: When did you acquire 70 per cent of the Stuart Company stock?

The Witness: Shortly after the settlement agreement of November 28th.

The Court: When I say "70 per cent," I mean the extra 10 per cent.

The Witness: Yes, it was shortly after that settlement agreement.

The Court: Whom did you acquire your extra 10 per cent from?

(Testimony of Arthur Hanisch.)

The Witness: From Lewis in our settlement agreement; he returned the stock. I must explain that the stock certificates had not actually been issued to Mr. Lewis, but I had an oral agreement to do that.

The Court: In other words, at all times you were in control of the Stuart Company?

The Witness: That is correct.

The Court: When was the Shaler Food Products Company organized?

The Witness: It was formed at the same time the Stuart Company was organized.

The Court: How many shares of stock?

The Witness: It had exactly the same stock setup.

The Court: The same stockholders?

The Witness: Yes. [47]

The Court: Did you put \$1,000.00 into that company?

The Witness: Yes.

The Court: All right, Mr. Mackay.

Q. (By Mr. Mackay): We have referred to the Vita-Food Corporation. Did you own any stock in that? A. No.

Q. Do you know who owned the controlling interest in it?

A. I do not definitely know. I was assured that Mr. Lewis had authority to speak for the corporation, but I have no idea whatever what the stock ownership was.

Q. Did your Stuart Company or the Shaler

(Testimony of Arthur Hanisch.)

Food Company either one, have any stock interest in the Vita-Food Corporation?

A. None whatever.

The Court: Well, who were the principals in the Vita-Food Corporation?

The Witness: It was very difficult for me to find that out.

The Court: Well, do you know when it was organized?

The Witness: I do not.

The Court: Was it a California corporation?

The Witness: I assume that it was.

The Court: Did Mr. Lewis have anything to do with it? [48]

The Witness: Mr. Lewis at one time was secretary and also treasurer. I have had letters from him signed "Secretary and Treasurer."

Mr. Maiden: If the Court please, Mr. Lewis is here and will appear as a witness in the case.

The Court: Very well.

Now, who were the officers of the Stuart Company in 1941 and 1942?

The Witness: I was president, Mr. Dunlap was assistant secretary.

The Court: Mr. Dunlap was assistant secretary.

The Witness: Could I ask Mr. Dunlap for those officers? I don't remember them.

The Court: No. If you don't remember, that will be brought out later.

Now, who were the officers of the Vita-Food Company, to the best of your knowledge?

(Testimony of Arthur Hanisch.)

The Witness: I don't know.

The Court: You don't know who the president was?

The Witness: No, because we had a different set of officers for the two companies.

The Court: I said the Vita-Food Company.

The Witness: No, I do not know.

The Court: Well, you were carrying on business dealings with them, weren't you? [49]

The Witness: That is correct.

The Court: You don't know who the president of the company was?

The Witness: At one time the president of the company was Paul Overton, but I do not know that he was president at the time the contract was signed.

The Court: Well, who signed the contract?

The Witness: Mr. Lewis signed the contract.

The Court: What office did he hold?

The Witness: He was treasurer of the corporation.

The Court: All right. What is his first name?

The Witness: Maxwell Lewis. I think the initials are "M. H.," I believe.

The Court: Maxwell H. Lewis was secretary. You don't know who the other officers were?

The Witness: I can't tell for a certainty.

The Court: Do you want to develop anything else on this, because we will take a recess in a few minutes?

(Testimony of Arthur Hanisch.)

Mr. Mackay: No, I think, your Honor, that covers about as much as I know about the corporate stock and the ownership. I have no questions, so if you want to take a recess, all right.

The Court: Will you please accommodate me by bringing out those basic facts through some one else later?

Mr. Mackay: Well, we can probably stipulate that. [50]

The Court: I want you to stipulate.

We will take a short recess.

(Short recess taken.)

The Court: You may proceed.

Mr. Maiden: It might clarify the Court's inquiry somewhat, if I state at this time the Vita-Food Corporation was organized as a California corporation in November of 1940, that its president was a Mr. Overton, its vice-president to start off with was Mr. M. H. Lewis. Mr. Overton has been at all times and still is the president of Vita-Food Corporation. Mr. Lewis is now, and was during the pertinent period, the treasurer. When he left the office of vice-president, a Mr. Wiseman became vice-president. Mr. Wiseman was succeeded as the vice-president by a Mr. McBride in 1942 or 1943. Mr. McBride is now the vice-president of Vita-Food Corporation. Mr. Lewis became a first director, so to speak, and the managing director of the Vita-Food Corporation after this agreement of

(Testimony of Arthur Hanisch.)

May 5, 1941, and operated in that capacity during the entire time pertinent to this case.

The Court: Is that stipulated?

Mr. Mackay: Yes, ma'am.

Q. (By Mr. Mackay): Now, Mr. Hanisch, do you have a correction to make on the statement you gave the Court?

A. Regarding the officers, I was in error. [51]

Q. Officers of whom?

A. Of both corporations.

Q. Now, what were they, the Stuart Company?

A. The officers of the Stuart Company were as follows: Donald Hops was president, Eloise Johnson was vice-president, Robert H. Dunlap was secretary and treasurer.

The Shaler Food Products officers were as follows: I was the president, Mr. Lewis—Mr. M. H. Lewis—was vice-president, Mrs. Arthur Hanisch, my wife, was secretary, and Robert H. Dunlap was assistant secretary. Mrs. Hanisch was secretary and treasurer.

Q. Now, do I understand you to say that you put in a thousand dollars, in the Stuart Company for all of its stock? A. That is right.

Q. Now, then, what did you do with the stock?

A. I gave it to the other individuals.

Q. How much?

A. I gave the ownership as follows: Hanisch, 600 shares; Pringle, 200 shares; Lewis, 150 shares; Pelletier, 50 shares. That was in each corporation.

Q. In each corporation; I see.

(Testimony of Arthur Hanisch.)

Mr. Mackay: I think, your Honor, that that pretty well covers the basic situation.

Q. (By Mr. Mackay): May I ask you again, have you ever at any time owned any stock in the Vita-Food Corporation? [52] A. No.

Q. Has either one of the corporations, the Stuart Company or the Shaler Company, ever owned any stock? A. No.

Q. Now, Mr. Hanisch, what is the nature of the business of the Stuart Company?

A. It is the distribution of vitamin products to the public through what is known as ethical channels, that is, using the medium of detailing doctors.

Q. Now, I think you stated that the Stuart Company and the Shaler Food Products Company were organized in March, 1941. A. That is correct.

Q. Now, prior to that time were you engaged in any business connected with the distribution and sale of vitamins? A. No.

Q. Will you tell the Court how you became interested in that business?

A. I had been ill. I had been in various tuberculosis sanatoria and in hospitals for a matter of five years, and after 1937 I was able to be up. I had a period of two or three years of convalescence. I had expressed a desire to live out here. I wanted something to do to justify my existence out here, and I told Mr. Pringle, a very good friend of mine, that if he ever found anything that might give me an interesting reason out here, to bring it to me. It was as a result of that [53] conversation that

(Testimony of Arthur Hanisch.)

he originally made me aware of the Vita-Food Corporation and its products.

Q. Did you ever meet Mr. Borsook of the California Institute of Technology?

A. Dr. Borsook?

Q. Yes. A. Yes.

Q. When did you meet him?

A. As I recall it, it was in December of 1940. I am not completely sure. It was either December, or January of 1941.

Q. Did you discuss with him the advantages of the Vita-Food products distribution?

A. Yes.

Mr. Maiden: If the Court please, I object to that as being a leading question. I think Mr. Hanisch should be permitted——

Mr. Mackay: I will withdraw that.

Q. (By Mr. Mackay): Will you please state what conversations you had with Dr. Borsook at that time?

A. Yes. The introduction to Dr. Borsook was arranged by Charles King, a Pasadena Post reporter. I had a luncheon meeting with them in which they told me they were interested—when I say “they” I refer to Dr. Borsook and Mr. Lewis—that they were interested in correcting what they thought was a bad [54] situation in the vitamin field, in that the prices were so high that the average consuming public could not afford to buy them. Dr. Borsook was very much impressed with the complete need of vitamins for everyone. He felt

(Testimony of Arthur Hanisch.)

that there was a terrific vitamin deficiency in practically every individual in the country, and he was very much interested in getting a product to the public at the lowest possible price. In other words, his semi-slogan was, "The greatest number of vitamins to the greatest number of people at the lowest possible price."

The Court: What was the relation of Dr. Borsook to the Vita-Food Corporation, please?

Q. (By Mr. Mackay): Can you tell that?

A. Yes. Dr. Borsook was presented to me as having—and he told me that, and he referred to it as "he and his boys at the California Institute of Technology"—had perfected a new process for the production of vitamins which would greatly bring down the cost from the best known product existing on the coast at that time, which was a product called Galen B, and he wanted to have an association with somebody who was willing to merchandise in a manner consistent with what his expressed policy was, that is, they were to take a very nominal profit, and he wanted to be associated with somebody on the distribution end who would be willing to do that, but he did not want to be associated with somebody that was primarily in [55] the thing to make a lot of money, because he told me that he honestly felt that we could accomplish a great deal of good if we both worked together on that general policy.

Q. When were you introduced to Mr. Lewis?

A. The same——

(Testimony of Arthur Hanisch.)

The Court: That doesn't answer the question.

Mr. Mackay: I am sorry.

The Court: As far as I can see, a lot of this is immaterial. Vita-Food Corporation apparently had something that it made the subject of a contract with the Stuart Company.

Mr. Mackay: Yes, your Honor, I was just——

The Court: And whether Dr. Borsook sold something to the Vita-Food Company to use, I don't know. Whether Dr. Borsook was on the pay roll or staff of the Vita-Food Company or not, I don't know. Dr. Borsook, as far as I have heard, is nothing more than an interesting figure who had done some research in vitamins, and Mr. Hanisch talked to him.

The Witness: I am sorry, your Honor. I can answer that, I think, and explain.

Mr. Mackay: Will you, please.

The Court: I wish you would direct the witness, please, and proceed with questions and answers.

Q. (By Mr. Mackay): Will you, please, explain how that was presented to you by Dr. Borsook? [56]

A. Dr. Borsook said that he and his boys at the California Institute of Technology——

The Court: I don't think you get my point, Mr. Mackay. I will ask you this: Will you please ask the witness whether Dr. Borsook sold anything for Vita-Food products, or did Vita-Food products buy anything from Dr. Borsook?

Mr. Mackay: If your Honor please, I may state this, that Dr. Borsook did not sell any products to

(Testimony of Arthur Hanisch.)

the Vita-Food, but, as I understand the story that I am trying to develop, Dr. Borsook, after talking to Mr. Hanisch about the need for vitamins at a low price, introduced Mr. Hanisch to Mr. Lewis who was representing then The Vita-Food Corporation, and who was in possession of this so-called secret process.

The Court: That is, The Vita-Food Corporation?

Mr. Mackay: Yes, your Honor.

The Court: So Dr. Borsook appears only as a person who served to interest Mr. Hanisch in what the Vita-Food people had, isn't that correct?

Mr. Mackay: Well, it is my understanding that Dr. Borsook and Mr. Lewis were the two that induced Mr. Hanisch to come into this and to sell and distribute the product which had been made by the laboratories of the California Institute of Technology, but was being manufactured then, at that time, by The Vita-Food Corporation.

The Court: Well, that is what I asked you. Does The [57] Vita-Food Corporation have something that Dr. Borsook sold to them or developed, or something else? Now, that question hasn't been answered.

Mr. Mackay: It is my understanding that The Vita-Food Corporation did have—or at least it was represented to Mr. Hanisch that they did have—the process which had been represented to Mr. Hanisch as having been developed in the California Institute of Technology by Dr. Borsook.

(Testimony of Arthur Hanisch.)

The Court: All right.

Mr. Hanisch, did anyone in Vita-Food Corporation represent to you that they had some process that had been developed at the California Institute of Technology?

The Witness: They did not say that they had ownership. However, Dr. Borsook said that he had a great deal of faith in the ability of The Vita-Food Corporation as manufacturers using the process that had been developed at the California Institute of Technology. Therefore——

The Court: All right. Then, isn't this the situation? Someone thought that you might be interested in The Vita-Food Corporation. a process that it had, and some product that it made, and Dr. Borsook told you that he thought it was a reputable concern. He was an authority on vitamins and this company was making vitamins, and he thought that they were reputable. Isn't that the sum and substance of it?

The Witness: That is correct. However, there were [58] certain situations in the contract as it developed, in which Dr. Borsook proceeded to O.K. certain acts on our part, principally the matter of——

The Court: Was he mentioned in the contract, Mr. Mackay?

The Witness: No, he is not.

The Court: Then, if he isn't mentioned in the contract, he is not in the contract.

The Witness: But there was a verbal contract.

(Testimony of Arthur Hanisch.)

Q. (By Mr. Mackay): Now, Mr. Hanisch, what representations were made at that time?

A. The primary representation that was made—there were two primary representations that were made which were of outstanding importance to me: one, I had personally taken the Galen B product. I knew that it was very expensive, that the price was \$4.75 per bottle. They represented that they could produce a bottle, and gave the implication that they had the same type of product, that is, a product primarily from natural sources, which could be sold at half or less than the Galen B product. That was a very important representation to me.

They represented also that they had a unique manner of stabilizing Vitamin A in connection with members of the B-complex. It was presented to me as being a unique way of [59] doing substantially the same thing that Galen B had done, at half the price.

I asked whether they had the patents or whether it was a secret process, and they told me it was a secret process, that they preferred not to go into patents.

I also asked questions—I was trying to get to the meat of the matter—I wondered whether it was labor saving or saving on materials, but I got no answer.

Mr. Maiden: I would like to know whom Mr. Hanisch had these conversations with.

The Witness: Dr. Borsook and Mr. Lewis, and

(Testimony of Arthur Hanisch.)

Mr. Pringle, one of our directors, later on was also present.

Mr. Maiden: Thank you, Mr. Hanisch.

The Court: Would it be a fact, Mr. Hanisch, that a corporation such as The Vita-Food Corporation would be able to use any process developed by the California Institute of Technology?

The Witness: I don't believe as such, and it never was represented to me that it was a development of that institution.

The Court: Well, you so stated a few minutes ago.

The Witness: No, I stated that Dr. Borsook stated it was a development in his laboratory with his boys.

The Court: What do you mean by that?

The Witness: That he had done the work on his own [60] with his own associates.

The Court: It was done in his own laboratory?

The Witness: He did not explain it to me. The way he presented it, I assumed the work had been done at Caltech,

The Court: But it was his personal work, is that right?

The Witness: It was never completely and clearly explained to me, but the impression was that it had the aura of background of California Institute of Technology, developed there, working with his associates.

The Court: Well, for purposes of making findings of fact, Mr. Mackay, I will want to know

(Testimony of Arthur Hanisch.)

whether this was a process developed by Dr. Borsook, said to have been developed by him personally, or a process that was developed somewhere else, but I think this clears up the matter, as I understand it. It is represented that Dr. Borsook had developed some process in his own laboratory with his assistants, and it happened that he was at California Institute of Technology. Of course, from the standpoint of salesmanship, the unaware and unwary might be led into believing that this was something developed by the California Institute of Technology, but for purposes of findings of fact by the Court we would want to be clear about that.

Q. (By Mr. Mackay): Now, Mr. Hanisch, did Dr. Borsook represent to you that he had a private laboratory separate and apart from the [61] Institute?

A. There never was anything definite mentioned about it. The impression was that the work had been, as far as I understood it, done at Caltech.

The Court: But you never found out definitely?

The Witness: There was a vagueness in this whole thing that is difficult for me to describe. In the second place, I never knew where the Vita-Food plant was. I never was able to get a financial statement. There was a great deal of information which was kept very much to The Vita-Food Corporation and Dr. Borsook, which I was not able to get, but I assumed, in talking to Dr. Borsook, I was talking to a man with an academic standing and with a reputation, and I therefore did not go into the

(Testimony of Arthur Hanisch.)

questioning of those details as much as I would in a normal business deal.

Mr. Mackay: We are ready to prove later on, if your Honor please, that this process was not a secret process, and instead of being developed in a laboratory there, it was developed in a bathtub and in a garage. That will come later. I just want to clear up this about the representations that induced Mr. Hanisch to go into this particular endeavor.

Mr. Maiden: In other words, you are going to prove that it was produced in a bathtub, is that right?

Mr. Mackay: Well, it certainly wasn't produced—I may be wrong with respect to a bathtub, but I understand, and [62] we shall later on prove, that it was produced in a kitchen or a garage.

Q. (By Mr. Mackay): Now, Mr. Hanisch, were any representations made at that time with respect to the financial ability of The Vita-Food Corporation?

A. Yes, to this extent: Mr. King, the reporter who brought the deal to me, was at my house, and there were several questions that I wanted him to verify before going into a deal of this nature. One of them was, I would like to have a financial statement from them. They refused to give me that statement, but in a subsequent meeting both Mr. Lewis and Dr. Borsook assured me that The Vita-Food Corporation was financed adequately or sufficiently to the point where they could carry on this

(Testimony of Arthur Hanisch.)

operation, that is, the operation of manufacturing and supplying me with the amount of material that I would need.

Q. Well, now, at that time was there any conversation with respect to whether or not you could advertise this formula or product produced by this formula as a product of the California Institute of Technology?

A. There was conversation on that point.

Q. What was it?

A. We realized—or I realized—the value of being able to tie up a product and to give it the aura of respectability that a tie-up with an institution like the California [63] Institute of Technology would give us. However, this was a verbal understanding, it was never reduced to writing, that our men—we don't have salesmen in the normal sense of the word; we call the men who call on doctors "detail men"—our men had Dr. Borsook's permission to use his name in connection with it verbally. However, we were never allowed to use it in any literature we sent to the doctors.

Q. Do you know whether that was because of the policy of the Institute?

A. I don't know. It was simply as a result of my conversations with Dr. Borsook and Mr. Lewis.

The Court: Do I understand from this testimony, Mr. Hanisch, that your detail men then did represent to doctors orally that the formula had been developed by the Institute of Technology?

(Testimony of Arthur Hanisch.)

The Witness: In connection with work at the California Institute of Technology, yes; that is correct.

Q. (By Mr. Mackay): Now, as a result of these conferences with Dr. Borsook and Mr. Lewis, representing The Vita-Food Corporation, did you enter in a contract with them?

A. Prior to the contract I purchased two lots of merchandise from The Vita-Food Corporation, one purchase of 3,000 gallons was made in February of 1941, and one lot of 3,000 gallons was purchased in March of 1941. This was prior, of [64] course, to the contract.

Q. Now, as a result of these conversations with Dr. Borsook and Mr. Lewis, did you form two corporations? A. I did.

Q. What were their names?

A. The Shaler Food Products Company and The Stuart Company.

Q. Subsequent to that time, did these two corporations enter in to a contract with The Vita-Food Corporation? A. We did, on May 5, 1941.

Q. I show you an original contract and ask you to state whether or not that is the original contract.

A. The date is May 5th, that is my signature; that is it.

Mr. Mackay: If your Honor please, I should like, with counsel's permission, to substitute a copy of this for the original.

Mr. Maiden: That will be agreeable.

(Testimony of Arthur Hanisch.)

Mr. Mackay: And have it marked as Exhibit next in order.

The Court: It is received as Petitioner's Exhibit 8.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 8.)

The Court: What is the date of the contract?

Mr. Mackay: It is May 5, 1941.

The Court: That was the first contract? [65]

Mr. Mackay: Yes, your Honor.

I would like at this time, if your Honor please, to call your attention to a preamble in the contract which I think is quite important:

“Whereas, second party”——

and the second party at that time was The Vita-Food Corporation——

“has undertaken to make available to a large number of people vitamin food concentrates which have heretofore been unobtainable by them on account of high prices, and desires to produce such food concentrates of high standard at prices lower than heretofore offered in this country, and first and third parties are in accord with second party in the view of the desirability of accomplishing this purpose to the end that the nutritional standards now prevailing in this country may be greatly improved.”

(Testimony of Arthur Hanisch.)

Q. (By Mr. Mackay): Now, Mr. Hanisch, will you state whether or not you had any understanding, verbal or otherwise, with Mr. Lewis and Dr. Borsook with respect to assisting the California Institute of Technology with any profits or any money? A. Yes, I did.

Q. Will you please state to the Court what that was?

A. In light of their expressed desire to further the [66] work in research in a nutritional field, they had expressed this desire to take purely reasonable profits, and they asked me to do the same thing, and I told them that I was enough interested in the thing that they were trying to accomplish, that when, as, and if my corporations made money as a result of this venture, I would be glad to give 10 to 15 per cent of any profits we made to the Institute to further that type of research.

The Court: This was just an oral conversation?

Mr. Mackay: That is right.

The Witness: This was just a conversation.

Q. (By Mr. Mackay): Now, Mr. Hanisch, after the contract—may I ask this: Will you please tell the Court why you organized the two corporations?

A. Yes. We had a very definite reason for that. It may sound complicated and it may take me a little time, but I want to go into it quite thoroughly because it had a definite reason.

We decided to form two corporations for this reason: Dr. Borsook was convinced that the cheap-

(Testimony of Arthur Hanisch.)

est possible way to get merchandise to the consuming public was through grocery channels, in which your wholesale and retail mark-ups are known to be lower than they are in the drug field. He therefore felt that, given a cost of manufacturer, put them through the grocery [67] wholesalers and the grocery retailers, the consuming public eventually would buy the product on a much cheaper basis than if they went through the drug field. However, we were not completely sure that that was the approach, because we felt that it might involve missionary work in revising people's buying habits. In other words, an average individual who buys drugs or anything for health is accustomed to go into the drugstore, and we felt that it might be difficult to reconvert people's buying habits and sell a pharmaceutical product in a grocery store. For that reason I formed two corporations to make a complete test on which was the right procedure.

I formed the Shaler Food Products Company, which was organized to merchandise purely through the grocery field. I formed The Stuart Company, which was formed to merchandise through the drug field. I ran them as separate corporations.

The reason that you see our officers are different, they were deliberate dummies, because I wanted to make a cold test without prejudicing the doctor **against** The Stuart Company. I didn't want that identity revealed.

Q. Did the Shaler Food Products Company

(Testimony of Arthur Hanisch.)

undertake the distribution and sale of vitamin products? A. It did.

Q. How long did it continue?

A. We started operating and making actual sales either in May or June. I don't remember exactly when we got the first [68] order, but it was substantially that time.

Q. Under what name?

A. Under the—we first, in the contract you will notice that we use the name “Vitaplex.” However, it was found that it interfered with a name that William T. Thompson owned, and we eventually changed the name to “Calplex.” The reason for the “Cal” in there was to give it the California Institute of Technology connotation as nearly as we dared to go, and it was deliberate.

Q. Now, how long did the Shaler Food Products Company continue?

A. The Shaler Food Products started operating, as I told you, in May and June. We originally thought that we could get doctors to prescribe and send patients to grocery stores for the product. We found that that could not be done. We changed our whole procedure and put it out as what is known as a consumer advertising item. In other words, advertising to the consumer through the medium of the newspapers and so forth. The thing never was successful.

Q. When did you discontinue the Shaler Food Products Company?

(Testimony of Arthur Hanisch.)

A. We merged it in with the Shaler Foods Company in June, 1942.

The Court: What do you mean by "We"?

Mr. Mackay: Well, I understand that— [69]

Q. (By Mr. Mackay): Can you tell the Court what you mean?

A. I think I can. There was business still coming in on Shaler. We had established contacts with some people who still asked for it. We wanted to continue that business in some form of structure. We did not, however, want to run a separate business, so we took the stock of the Shaler corporation and merged it into the corporate structure of The Stuart Company.

Q. And discontinued the Shaler Food Products Company altogether? A. As a company.

The Court: Who acquired the stock of the Shaler Company, the individual stockholders of The Stuart Company or The Stuart Company?

The Witness: Yes. At that time we doubled our stock, and The Stuart Company had 2,000 shares then, instead of 1,000, and the stock ownership remained the same, that is, percentagewise, except that they had it all in 2,000 shares of Stuart instead of having it 1,000 in Shaler and 1,000 in Stuart.

Mr. Mackay: I intended to put that on with another witness. I can go into it further, but, as I understand it, the Stuart Company had increased its capital situation and had issued stock for the assets of the Shaler Company, and then the [70]

(Testimony of Arthur Hanisch.)

Shaler Company was dissolved. That is what I understand.

Q. (By Mr. Mackay): Now, Mr. Hanisch, does The Stuart Company, that is, the name of this petitioner—where did you get that?

A. The name of "Stuart" in the company?

Q. Yes.

A. I could explain that this way: I wanted a personal name of some kind in the title of the corporation. I therefore—to be very frank about it, the name "Hanisch" I would have used except that is a difficult one to spell, and really had a German connotation at the start of the impending war. I therefore, instead of using my last name, took the first names of my two sons. The oldest is "Shaler," and we gave that to the Shaler Company. My younger son is "Stuart," and we called that company The Stuart Company.

Q. Now, how did the so-called "Stuart formula" get the word "Stuart" in there?

A. Because it was the name of our corporation.

Q. And also the name of your son?

A. That is right.

Q. At the time this contract of May 5, 1941, was entered into, as far as you know had any application been made for the registration of the so-called trade mark, "the Stuart formula"?

A. I was told by the individuals involved that it would be made, and it also stated in the contract that application [71] would be made.

Q. Yes. Now, will you please tell the Court

(Testimony of Arthur Hanisch.)

the manner and method that you used in distributing and selling—that is, I am speaking of the manner and method that The Stuart Company used in distributing and selling—this product?

A. Our method of operation in The Stuart Company has always been what is known as the ethical approach to the ultimate consumer. In other words, we do not have salesmen in the strict sense of the word. We hire men who have training to call on doctors to present our products to the doctors. The doctor in turn prescribes the product to his patients, and that is what is known as the ethical operation. The term is used, I think, primarily because one thing that is considered very unethical in that field is to make a direct approach in an advertising way to the ultimate consumer. It must all come through the doctor.

Q. May I ask you, did you advertise this so-called Stuart product?

A. To the ultimate consumer?

Q. Yes. A. Never.

Q. What did your advertisements consist of?

A. Our advertising consisted of sampling to the doctors, that is, actual samples of our product and literature sent to the doctors. [72]

The Court: From what the witness said a short time ago, they did advertise in the newspapers?

Mr. Mackay: We will clear that up now.

Q. (By Mr. Mackay): What kind of advertising did you do with respect to the Shaler Company?

A. With the Shaler Company we went directly

(Testimony of Arthur Hanisch.)

to the consumer and hit the consumer approach on that operation.

The Court: The product had the same name?

The Witness: The product did not have the same name. The product in the grocery field was "Calplex," and the product through the drug field was known as "the Stuart formula."

Q. (By Mr. Mackay): Well, was it the same product sold under two different names?

A. No, it was the same type of product. However, the vitamin potency, the unitage was different. In other words, the grocery product was a cheaper item. The reason for that being, your Honor, that in the grocery field, when you go beyond a price of 50 to 75 cents, you are out of bounds for their type of trade, and they don't like a product that is higher priced than that.

Q. Now, this agreement, the May 5, 1941, agreement, I think that agreement required The Stuart Company to buy all of its products from The Vita-Food Corporation? [73]

A. That is true.

Q. And also that the prices for the purchases of those products were set forth in the contract?

A. That is right.

Q. The contract also provided for the price at which The Stuart Company could retail, is that right?

A. We had to have the approval of The Vita-Food Corporation to change our retail price. However, there was a provision which would allow us to raise in case the cost of the Vita-Food product to

(Testimony of Arthur Hanisch.)

us went up. There was no provision, though, that would take care of any increased expenses that The Stuart Company might have. In other words, that was not provided for. There was an automatic provision in the contract that if the Vita-Food product had to be raised because of increased cost, we could raise or increase the cost proportionately.

The Court: What contract was that covered in?

The Witness: The contract of May 5, 1941.

The Court: What is the clause in there?

The Witness: I haven't it here, your Honor.

Mr. Mackay: Here it is, your Honor, Exhibit 8.

The Court: What clause in the agreement refers to the maintenance of a retail price?

Mr. Mackay: I think it is on page 3, clause 5. I shall read it now. I am on page 3, paragraph 2:

"The Stuart Company, one of the first parties, [71] agrees that the concentrate received by it under said contract of March 7, 1941, will be sold and distributed under second party's trade mark or label, The Stuart Formula, and/or under such other of second party's trade marks or labels as may be mutually agreed upon by first and second parties, to retail at \$1.95 per pint bottle plus any applicable sales tax."

The paragraph following that relates to the Shaler Food Products Company.

The Court: That is probably sufficient.

Mr. Mackay, what did The Stuart Company and

(Testimony of Arthur Hanisch.)

the Shaler Food Products Company do with respect to their label? They had a name that they were going to use in the resale and marketing of this product. Now, as I understand it, the product was made by The Vita-Food Corporation, and Shaler and Stuart were to resell the product under their own label, and they adopted the name "the Stuart formula," and they adopted another name, "Vita-plex," which was later changed to "Calplex." Now, did they register these names anywhere? They refer here in the agreement to the second party's trade marks or labels. Now, which was it, was it a label or a trade mark, as a matter of law?

Mr. Mackay: As I understand, at the time this contract was entered into, as far as The Stuart Formula was concerned, [75] which is the main thing here, there was no trade mark, no application had been made; but I understand that The Vita-Food Corporation—that is what I intend to bring out with this witness—manufactured the product, that the labels were procured by The Stuart Company and placed on that with the Stuart name on it——

The Witness: That is not correct. We did not place the labels on. The labels were placed on by The Vita-Food Company.

Q. (By Mr. Mackay): Who prepared the labels?

A. We did it together. We discussed the various statements to be made. On the technical, we were

(Testimony of Arthur Hanisch.)

guided by what Dr. Borsook and Mr. Lewis advised on the thing.

The Court: Well, up until the end of this arrangement, did The Stuart Company ever get a trade mark?

Mr. Mackay: No, your Honor.

The Court: All right.

Is that true, Mr. Hanisch?

The Witness: That is true.

Mr. Mackay: Except as I stated in my opening statement, that in the contract of settlement there was a dispute at that particular time. The Stuart Company had been advised by reputable patent counsel that the trade mark which had been registered by The Vita-Food Corporation, "The Stuart formula," [76] was invalid because of misrepresentation, and in the agreement——

The Court: Well, that has to do with Vita-Food. My question was whether either Shaler or Stuart had a trade mark or trade marks.

Mr. Mackay: No, except I want to explain this: In the agreement of November 28, 1942, which has not been introduced in evidence, Vita-Food quit whatever interest they had in the trade mark.

The Court: You are talking about a trade mark that Vita-Food got, aren't you?

Mr. Mackay: Yes.

Mr. Maiden: Your Honor, I want to make it clear at this point, and I don't think it is clear, from a statement made by your Honor, under this paragraph 2 in Petitioner's Exhibit 8, the second

(Testimony of Arthur Hanisch.)

party referred to there is The Vita-Food Corporation, and it states here that this trade mark or label, "the Stuart formula," is the property of the second party, which is The Vita-Food Corporation.

Mr. Mackay: Yes, I appreciate that, your Honor, and I will ask this witness if at the time—I think he has answered it once before—if at the time this contract was signed there was a trade mark, "the Stuart formula."

The Witness: There was not.

Q. (By Mr. Mackay): Now, in selling this product which The Stuart Company [77] purchased from The Vita-Food Corporation, was any label, correspondence or literature disclosing that The Vita-Food Corporation was the manufacturer, ever used?

A. You mean, did we ever use anything disclosing that?

Q. Yes. A. We did not.

Q. You did not. Now, I will ask you if these are the labels that were used in the sale of the products, Mr. Hanisch.

A. This is the label indicated "A" which was used in the sale of the product prior to the cancellation agreement. The one marked "B" is the revision we made after the agreement of November 28th.

Q. Now, that is just the front part of the label?

A. These two exhibits (indicating) are the front part, and these (indicating) are the back part.

Q. What I have in mind, is the back part.

(Testimony of Arthur Hanisch.)

A. That is right.

Mr. Mackay: If your Honor please, I should like to offer these in evidence.

Mr. Maiden: No objection, if the Court please.

Mr. Mackay: I think, if we could pin these other labels on here, or paste them on there—I should like to offer those in evidence, if your Honor please, and we will get some mucilage later.

The Court: Without objection, this is received as [78] Petitioner's Exhibit 9.

(The documents above-referred to were received in evidence and marked Petitioner's Exhibit No. 9.)

Q. (By Mr. Mackay): Now, were all the products that were sold by The Stuart Company from May 5, 1941, to the termination agreement or cancellation agreement of November 28, 1941, sold under these labels which have just been presented to the Court in evidence?

A. That is not completely true for this reason: According to the contract we had a right to sell a product manufactured by The Vita-Food Corporation, known as "Vitall," outside of Los Angeles County. We also had the right to sell a product which had been sold by Mr. King, "Buoyant B." We also sold a product, calcium-pantothenate. That was called, "The Stuart Calcium-pantothenate."

Q. Now, you stated that The Stuart Company had the right to sell Vitall outside the City of Los Angeles?

(Testimony of Arthur Hanisch.)

A. Yes, with the provision when, as, and if our sales got up to 2,000 pints a day, we would take over the distribution of Vitall even in Los Angeles.

Q. Who was selling Vitall in Los Angeles?

A. The Vita-Food Corporation itself.

Q. I think, Mr. Hanisch, you stated a while ago that it was represented to you that they had a process through which a [79] stable product could be developed. Will you please explain to the Court what you mean by "a stable product"?

A. Well, please understand that I am not a technical man. However, one of the **important** things in a pharmaceutical operation is to be certain that you meet all the requirements of the Food and Drug Administration, and one of their primary requirements means that you must not have misbranding. In other words, your product must contain the unitage of the various vitamin factors that are stated on the label. It is known that in the vitamin field there is some loss of unitage, some factors lose unitage faster than others. The business of making a stable product is one that will have what the trade considers a reasonable shelf life, say, maybe, a year and a half to two years shelf life, without loss of unitage below the allowance given by the Food and Drug Administration, which is 10 per cent below the label claim. They do have a tolerance point there of 10 per cent.

Q. Well, now, I will ask you, did the product that you purchased from The Vita-Food Corporation during the period that we have here discussed,

(Testimony of Arthur Hanisch.)

from May 5, 1941, to November 28, 1942, whether or not that product had any defects? A. Yes.

Q. Will you please tell the Court what you found, and when?

A. It had several defects. One, there was a thing that [80] was known as separation. In other words, it wasn't a complete mixture. There would be one level of materials and then another level of materials. That was not the primary fault, however. The primary fault was—and we found out—that the nature of molasses—this particular product had a molasses base—the nature of molasses is such that it is almost impossible to keep it from fermenting. We had bottles explode in doctors' offices and drugstore windows and in our own office, and it was a very serious fault. To overcome that, the manufacturer—oh, he gave me several reasons—

Q. Now, "the manufacturer"—you mean Vita-Foods?

A. Vita-Foods. I brought it to his attention constantly during the life——

The Court: When did you first discover this?

The Witness: Very shortly after we started operating.

The Court: You say "very shortly." What do you mean?

The Witness: I would say within a month or two.

The Court: Was this the first time this product had ever been put on the market?

The Witness: By The Stuart Company, yes.

(Testimony of Arthur Hanisch.)

The Court: No, I mean by anybody.

The Witness: I don't know how long The Vita-Food Corporation had been marketing Vitall. They did have Vitall on the market.

The Court: Vitall is what blew up, is that right? [81]

The Witness: No. Vitall is similar to the Stuart product.

The Court: Vitall blew up?

The Witness: The Stuart product blew up.

The Court: The stuff that was called "The Stuart Formula" fermented?

The Witness: That is right. Now, that caused two things——

The Court: Well, now, you will assume that the Court is in the position of a reasonable person, and it would seem that if this were not the first time that "The Stuart Formula" had been made, someone would have discovered long before you that it would ferment and that the bottles would pop.

The Witness: We, of course, only had the experience of buying it and getting delivery, I think, from April until the first blow-ups happened, which was probably a month or two later.

The Court: Had they been selling this stuff they called "The Stuart Formula" to anybody before they sold it to you?

The Witness: They had sold a similar product using the same base under a brand name "Vitall," and another one under the trade name that Charley King developed, called "Buoyant B."

Shall I amplify that further? [82]

(Testimony of Arthur Hanisch.)

Mr. Mackay: I wish you would, please.

The Court: You never heard of any of these defects before?

The Witness: No, never had. It was represented to me that they knew how to make this product and have it be a satisfactory, merchandisable product.

Now, I called these various blow-ups and all the other faults that we found to the attention of The Vita-Food Corporation. They assured me that they could eliminate the defects. We found out—and this went on almost constantly, because I was very much frightened to put out that type of product. Now, naturally, if a product ferments to the point where it will explode the bottle, it is liable to cause digestive distress to a lot of people who take it, and we found there were a lot of people who could not tolerate the product for that reason.

There also was a molasses base——

The Court: I can think of other things that might happen if it fermented, too.

The Witness: Well, you can understand my feeling in that matter too. I was very much concerned, and I repeatedly asked them to overcome this fault. They assured me they would. I found out one way they tried to correct it. They put a vent in the cap of the bottle so that, instead of exploding the bottle, it would run over the sides, and we had labels ruined [83] all over the place as a result of that. Naturally, it destroyed my confidence in the ability of that manufacturer.

Q. (By Mr. Mackay): Well, now, Mr. Hanisch, did you ever see a letter from The Vita-Food Cor-

(Testimony of Arthur Hanisch.)

poration with respect to the explosion of these products?

A. Yes, I have a letter here of October 15, 1941, signed by M. H. Lewis, treasurer of The Vita-Food Corporation, saying this:

“Referring to your request for extension of time in which to comply with the quota requirements set out in the contract between ourselves of date May 5, 1941, and our several conversations relative thereto—we appreciate that you have been and may be put to a certain inconvenience and expense on account of frothing and breakage of Calplex and Stuart Formula bottles, and as an offset, we are agreeable that the contract referred to be amended by extending for a period of 60 days the time for the performance of the specified quota requirements.

“If this arrangement is satisfactory to you, please signify your consent thereto by signing in the place indicated and returning the enclosed copy of this letter.”

Mr. Maiden: Mr. Mackay, are you going to put that in [84] evidence?

Mr. Mackay: Yes, if you want. It has already been read in.

Mr. Maiden: He didn't read it all.

The Court: It is received as Exhibit No. 10.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 10.)

(Testimony of Arthur Hanisch.)

Q. (By Mr. Mackay): Now, Mr. Hanisch, you stated a while ago about the representations made with respect to the secret—well, let's first—with respect to the development of that product, will you please tell the Court whether, subsequent to the execution of the contract of May 5, 1941, you discovered that those representations were not correct.

A. Yes.

Q. And if so, in what manner?

A. I did not discover it personally. Mr. Dunlap and two representatives of our company had a long conversation with Dr. Ellis, who was one of the men who worked on the development of this product with Dr. Borsook. He told them that it was not a fact that it had been developed there, but that it was developed at his home, and he had been a part of it.

Mr. Maiden: Just a minute——

The Witness: He also stated——

Mr. Maiden: Just a minute. Are you repeating the [85] statement of a witness that was made to you personally?

The Witness: That is right. He asked me when I had become aware, and I became aware through my attorney, Mr. Dunlap. I was not in the conversation with them personally.

Mr. Maiden: In other words, the only way you know what Dr. Ellis said would be hearsay, what someone else told you?

The Witness: Well, I don't know technically.

Mr. Maiden: I object on the ground it is hear-

(Testimony of Arthur Hanisch.)

say and ask that the answer be stricken from the record.

The Court: The objection is sustained.

I think we had better recess for lunch, Mr. Mackay.

Mr. Mackay: I think that is a good idea.

The Court: We will recess at this time until 2:10.

(Whereupon, at 12:45 p.m., a recess was taken until 2:10 p.m. of the same day.) [86]

Afternoon Session, 2:10 P.M.

The Court: Proceed.

Mr. Hanisch, will you take the stand again, please?

Whereupon,

ARTHUR HANISCH

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Mackay:

Q. Mr. Hanisch, calling your attention to Exhibit 8, which is a contract dated May 5, 1941, and particularly to paragraph 6 on page 5, I will ask you to please read that. I think that paragraph relates to the minimum quota that your company was obligated to sell during the years involved.

(Testimony of Arthur Hanisch.)

A. Shall I read it?

Q. Yes. A. (Reading).

“First party shall have the exclusive right to sell said Vitaplex and Stuart Formula until November 1, 1941, *shall* right shall continue thereafter until and unless terminated by written notice from second party, provided, however, that such termination shall not become effective until and unless during any 60-day period between said [87] November 1, 1941, and May 1, 1942, the combined purchases of such products by first parties from second party shall not have averaged 1,500 pints per day, or unless during any 60-day period after said May 1, 1942, such purchases shall not have averaged 2,000 pints per day; and provided further, the date of any such termination shall be not less than 60 days from and after such notice of termination of said right.”

Q. Now, Mr. Hanisch, do you know how that quota was set? A. Yes.

Q. Will you please tell the Court?

A. We had conversations. We had decided there should be such a factor to protect The Vita-Food Corporation interests, in that they wanted to see us do a good job of merchandising. I was told figures on Vitall sales, which I learned later were not correct. I also was told figures on the sales of Galen B. which was the outstanding product on the coast, which I also learned were not correct.

Now, the quota was set unrealistically high be-

(Testimony of Arthur Hanisch.)

cause of those facts, and a thing which made it very impossible to even approach attainment of that quota was the faultiness of the product itself, as indicated by a letter of extension I got, releasing me from the quota for a period of time.

Q. When did you get that release? [88]

A. That was approximately October. We subsequently got another release from the quota restrictions, the following February.

Q. Is that February, 1942?

A. Correct, and also another release, I think it was May of 1942, but we never came close to attaining those quotas.

Q. What would your sales have to have been in dollars to have met that quota?

A. Shall I make that approximate?

Q. I mean approximate.

A. The final quota which we would have had to have reached by May of 1942, at 2,000 bottles a day, would be \$50,000.00 a month. They would have had to reach approximately \$75,000.00 per month.

Q. Now, did you have any disputes with The Vita-Food Corporation or Mr. Lewis with respect to the maintenance of that quota during particularly the spring and fall of 1942?

A. No, we just told him it was impossible of attainment, and it was unrealistic, and I was constantly worried about this factor of the contract because I realized at sometime they could step in and

(Testimony of Arthur Hanisch.)

exercise their right to cancel on the basis of that failure to meet that quota.

Q. Now, Mr. Hanisch, I call your attention to Exhibit 1 for the period ending March 31, 1942, which discloses a loss of \$6,462.14, and also Exhibit 2, which is for the fiscal year [89] ending March 31, 1943, which discloses a loss of \$962.80. Now, I will ask you, Mr. Hanisch, keeping in mind the sales that you made, why the company could not make a profit.

A. I didn't get your question. You asked me why we did not make a profit?

Q. Yes.

A. Because the prices as given to us were unrealistically high in light of the fact that our retailing price was set by The Vita-Food Corporation.

Q. In other words, the purchase price of the product to you was set by the contract?

A. That is correct.

Q. The Vita-Food had a right to set the retail price, too?

A. That is correct. Normally, in a business situation, if you find that you can't make money on a certain retail price structure, you have the latitude to do what you want to, either raise your price or get a lower cost from the man supplying you. I was stymied on both points as a result of this contract.

Q. Did you make any complaints to The Vita-Food Corporation with respect to the purchase price as well as the retail price?

(Testimony of Arthur Hanisch.)

A. We did, several times. As a matter of fact, our original price as you see it in this contract was \$1.95. We [90] asked for relief. Under that it was subsequently raised to \$2.05. We again found we couldn't adequately pay our people working for us, and we certainly couldn't make a profit if we couldn't pay those people adequately. We again went to Dr. Borsook—or Mr. Lauerhass, who was managing my office, I asked him to go to Dr. Borsook and ask for relief. I was told that I couldn't get it because it would be breaking faith with our public. Mr. Lauerhass asked the question, "Do you want to keep faith with the public at the expense of having the employees at The Stuart Company underpaid?" I called him and told him that if I couldn't get a price raise, that I was through, I could not continue to operate. Within a half-hour, he apparently called back and said the raise to \$2.30 had been granted.

Q. Now, did you explain to him about the cost to you of the product from The Vita-Food Company?

A. Oh, yes, constantly, because I could see, the way this thing was going, it was impossible to make any money with that price structure.

Q. Did you make an investigation in the fall of 1942 with respect to the availability of vitamins at a lower price?

A. In 1942?

Q. Yes.

A. I did not until 1942. I meticulously stuck to the contract, which was not even discussing prices

(Testimony of Arthur Hanisch.)

with anybody, [91] until my suspicions had been aroused on other points. A representative of the Merck Chemical Company came in to see me, and he said, "I can get you calcium-pantothenate tablets for"—and he told me what I could get them for, and he told me the people who could make them for me. He told me I was paying just about twice what I could get them for in the open market.

Q. Did you make an investigation by other companies as to whether or not you could buy the vitamin product, the ingredients for it, at that time?

A. Yes. I got in touch with Mr. Ken Miles, who was the sales manager of the William T. Thompson Company. I asked him whether he could make our product and what the price would be. He did not give me a definite quotation, but he said, "Approximately 60 per cent of what you are paying for the product at the present time."

Q. Did you also make an investigation of other manufacturers?

A. Yes, I did. The day after I talked to Mr. Miles, through Mr. Miles a Mr. Strate, vice-president of the Strong-Cobb Company of Cleveland, came in to see me, and I asked him the same question. He told me that they could not only duplicate our product, but give us an improved product, and again he gave me a figure of approximately 60 per cent of the price I was paying, which was verified in a formal quotation from the president of the company a short time later. [92]

(Testimony of Arthur Hanisch.)

Q. In letter form? A. In letter form.

Q. I show you a letter dated October 6, 1942, and ask you to please identify it.

A. You mean identify it?

Q. Who is it from?

A. It is from Strong-Cobb Company, Cleveland, Ohio.

Q. To The Stuart Company?

A. Yes, and it is signed by Dean MacAusland, sales department.

Q. Is this quotation you referred to as having been given to you in writing?

A. That is correct.

Mr. Mackay: I offer this in evidence.

Mr. Maiden: No objection, if the Court please.

The Court: It is received as Exhibit 11.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 11.)

Q. (By Mr. Mackay): Now, Mr. Hanisch, I think you stated this morning that at the time you made—just about the time or a little before you were making this contract of May 5, 1941, that Mr. Lewis had represented that his company was financially able to manufacture and carry on?

A. Yes. [93]

Q. I will ask if you subsequently found out anything contrary to that.

A. Yes, I did.

(Testimony of Arthur Hanisch.)

Q. Will you please state when and what the situation was?

A. Well, within a very few months after the contract was signed, a Mr. Pierce, who is either a wholesaler or represents the Owens-Illinois Bottle Company, called me up and asked whether I would guarantee the Vita-Food account, and he at that time stated that they would not sell Vita-Food unless I did guarantee it, and I did guarantee it. I called him up yesterday to verify that, and that is Mr. Pierce's understanding, they were working on the assumption that I guaranteed that account.

Mr. Maiden: I object to that as hearsay and ask that it be stricken from the record, his statement of what he was advised yesterday by a certain party with respect to any guarantees. It is absolutely pure hearsay.

The Witness: I was asked whether I would guarantee it, by Mr. Pierce, and I did.

Mr. Mackay: I think the witness can say he was asked to guarantee it.

The Court: It would sound to me like a very strange statement. A guarantee is one of the very firmest and severest legal responsibilities that anyone can take. If Mr. Hanisch [94] says that someone called up on the phone and asked him to guarantee someone's account, it wouldn't mean anything to me as a lawyer. I wouldn't give it any weight even though I took a liberal view about Mr. Hanisch's testimony. Guarantee what?

(Testimony of Arthur Hanisch.)

Now, the objection is sustained. If you want to prove that Mr. Hanisch entered into any guarantees for anybody else's account, you will have to be a lot more specific about it than that.

Mr. Mackay: May I make this observation, your Honor. I didn't intend to prove that Mr. Hanisch had guaranteed it. I am trying to develop that the representations of the financial ability of the Vita-Food Corporation in the beginning—that it was not as represented. In fact, one of his dealers who was selling the Vita-Food Corporation a product had asked Mr. Hanisch if he would guarantee the Vita-Food account, which would indicate, of course, that the Vita-Food Corporation was not financially responsible.

The Court: Well, it is not sufficient, Mr. Mackay. I would have to sustain that objection.

The Witness: There was another——

Q. (By Mr. Mackay): Wait a minute. May I ask you, did you discover subsequently, in any other manner than the manner that you have related, anything which led you to suspect that Vita-Food was not as strong financially as was represented to you when you [95] signed the contract?

A. Yes.

Q. What was it?

A. In about December, 1941—I know it was after war was declared, because that was the reason for this—Mr. Lewis and Dr. Borsook came to me. I had lunch with them, and they asked me whether

(Testimony of Arthur Hanisch.)

I would finance substantial purchases of raw materials for them, that they were not in a position to do it, and they were afraid there would be a shortage in the market because of the war situation. I refused to do that.

The Court: That need not necessarily indicate that they were not in good financial condition.

Mr. Mackay: We are in this position, your Honor—

The Court: If you want to prove, Mr. Mackay, what the balance sheet position of the Vita-Food Corporation was, you would have to prove it. Now a business concern can be solvent and in good condition, and yet carry on its business with a certain volume of goods and desire to purchase a larger volume of goods, and go to someone and say, "In making these larger purchases, we need some more capital. We don't want to go out and borrow it. You are associated with us in business. Will you go in with us on buying a larger quantity of goods?"

Now, that kind of a proposition that Mr. Hanisch testified about isn't proof that anyone is in good or bad financial condition. [96]

Mr. Mackay: I appreciate that, your Honor, and we are just in this position, and we had no access to the financial statements of Vita-Food. I understand that they have their difficulties with Uncle Sam on the other side, who is taking the opposite view that this was not a sin. That is what I assume, and, of course, we have no access to their

(Testimony of Arthur Hanisch.)

books or have any way of proving that, but I am bringing that out for this purpose.

The Court: What do you think is the materiality as to whether or not they were in good financial position? If they were selling a poor product under the contract, that would be one thing, but why do you think it is material whether they were or were not in good financial condition?

Mr. Mackay: Well, I think it was this way: Because the Stuart Company was involved in what we considered to be a very onerous contract, we are just putting in all the evidence we have got here, bit by bit. I think it will shape itself and show the materiality as we go along, because I am leading up pretty soon to show that, as a result of all these things we are talking about, that Mr. Hanisch, the Stuart Company, desired very much, and in fact it was the lifeblood of their business, to get rid of this particular contract.

The Court: They didn't have any other business, did they, except this contract?

Mr. Mackay: No, they were bound by it, and they [97] couldn't do it.

The Court: Just don't depend on that too much, Mr. Mackay. Don't ask the Court to give weight to something that is pretty thin and isn't entitled to very much weight.

Mr. Mackay: I appreciate that.

The Court: Why, your record will get along all right, but the Court isn't going to put as much importance on that kind of proof as you desire.

(Testimony of Arthur Hanisch.)

It may be difficult for you to establish your point, but that is a problem that you must face. Whether it is necessary for you to go into all of that is another matter.

Mr. Mackay: Could I make this observation, your Honor? I think that subsequent testimony will make clear the importance of that. I present it as just one step in the plan here that I have to prove our case, and I am sure that the Court will give it the weight it deserves, and if we don't connect it up, the Court can use its discretion and not use it.

Of course, I may point out this, your Honor, that I think that our evidence will show on that that it is very important here that a distributor such as The Stuart Company, who was distributing goods which were subject to the regulations of the Food and Drug Act, had a responsible supplier of the product. I think it will all tie in as it goes along.

The Court: Mr. Mackay, if you will just be realistic about it. The evidence shows so far there is a new corporation [98] organized, and it is going into business for the distributing of a product. It has no other business, never sold any other product, and, of course, it was subject to certain regulations, but almost every business that is conducted today is subject to some regulations.

Mr. Mackay: That is right.

The Court: In other words, just stick to the facts. You are arguing a theory here all the time. I don't know whether you have to do that, but you know your facts show one thing, so why try to

(Testimony of Arthur Hanisch.)

argue your theory at this time? Why not just stick to the evidence and present your theory when you get to your brief?

Mr. Mackay: All right, your Honor. Thank you.

The Court: The only reason that I interrupt you is, every time you say something into the record, it is in the record. I am only an umpire. My eye is on the record all the time, so you save your argument for your brief.

Mr. Mackay: Thank you, your Honor.

Q. (By Mr. Mackay): Now, Mr. Hanisch, you in your testimony have spoken about tablets and also liquid. I will ask you what was the nature of the product that you began selling first, I mean, The Stuart Company? A. Liquid.

Q. Liquid? [99] A. Yes.

Q. You sold that all the time from the beginning?

A. We sold that exclusively without any other product until about March, 1942, at which time we brought out a product in tablet form.

Q. In tablet form? A. That is correct.

Q. Subsequent to that time and until the cancellation agreement, did you sell the tablet form along with your liquid? A. Yes.

Q. Was that sold under the same label?

A. Yes—not exactly the same label, because you have to make certain descriptive qualifications that it was in tablet form, but outside of Vitamin C—I don't believe we had C in the tablets at that time. The formula, the vitamin content, was sub-

(Testimony of Arthur Hanisch.)

stantially the same in tablet form as it was in liquid form.

Q. Did you have any dispute with respect to the contents of the bottle containing the tablet form?

A. We had no dispute. However, we became suspicious of the product generally in September of '42, and we had had several reports from druggists of a very short count in the tablet content. After I had a repeated number of those, I had a certified public accountant send one of his men and make a count. I think we have that record of what actually happened [100] on the short count in the tablets.

Q. Is this the report you speak of?

A. Yes, that is October 19, 1942. That is it.

Q. Now, Mr. Hanisch, do you recall when an application was filed by The Vita-Food Corporation to register the trade mark "the Stuart formula," approximately?

A. I don't know the exact date of their initial application. It was shortly after the organization of our corporation, I assume. However, I do recall this, that The Vita-Food Corporation made application under the Act of 1905, and it apparently was turned down because Mr. Lewis came to me—and I think at that time I first met Mr. Wiseman—and they wanted us to change the name in some way, or put a device in it, so that they could qualify under 1905 registration. However, I said that didn't mean anything to me, it wasn't too impor-

(Testimony of Arthur Hanisch.)

tant, and I would rather have a less strong trade mark and not go to the bother of doing anything about it. So they, instead of that, apparently made application under the Act of 1920.

Q. Do you remember when that application was granted, approximately?

A. Approximately—you mean when the trade mark application was granted?

Q. Yes.

A. Approximately September, 1942. [101]

Q. Now, was there any dispute between The Stuart Company and The Vita-Food Corporation in September, October, or November of 1942, with respect to the ownership of the trade mark?

A. You mean had we had a direct dispute with them?

Q. Yes.

A. After we got into the situation of finding that it was impossible for us to work under this contract because of various things which I have told you, we made it a point to find out what our rights were on the trade mark, and I consulted trade mark counsel on the matter. We had, however, discussed the trade mark. I had discussed it with Mr. Lewis in several meetings during the summer of 1942.

Q. Did you consult any patent attorneys with respect to the validity of the application with regard to the trade mark?

A. Yes.

Q. What attorney did you consult?

A. Frederick Miller, of Miller & Hazard.

(Testimony of Arthur Hanisch.)

Q. They are located where?

A. Los Angeles.

Q. What is their standing in the City of Los Angeles?

A. Our counsel recommended it was one of the top trade mark and patent attorneys in Los Angeles.

Q. Did you get an opinion from the [102] counsel? A. We did.

The Court: Now, what is the purpose of this, Mr. Mackay?

Mr. Mackay: Well, if your Honor please, this has a purpose to show the reasons for believing that that trade mark at that time was not properly registered, all going to show that at the time of the deal the trade mark was of little significance in the minds of our parties as well as the other parties.

The Court: What year would that be?

Mr. Mackay: The opinion is dated November 7, 1942.

Mr. Maiden: November 17, 1942.

The Court: Why is it material whether they had the opinion that the trade mark application was or wasn't good?

Mr. Mackay: Well, if your Honor please, of course this agreement, which I haven't yet and probably should introduce first—I am referring to the agreement of November 28th.

Q. (By Mr. Mackay): I will ask you, Mr. Hanisch, if you had negotiations with The Vita-Food

(Testimony of Arthur Hanisch.)

Company in the fall of 1942 with respect to the cancellation of your agreement of May 5, 1941.

A. I did with their representative, Mr. Wiseman.

Q. Will you state about how long those negotiations were carried on?

A. You mean on this particular contract? [103]

Q. Yes.

A. My attorney got in touch with Mr. Wiseman approximately at approximately 6:00 o'clock in the evening. He telephoned me and told me that they were conferring. He asked me to stand by. I went to his office——

Q. Pardon me. I would like to withdraw that. I don't think you answered the question. I will withdraw the question.

I will ask you if this is the original agreement of settlement of litigation, cancellation of contract, dated November 28, 1942, between The Vita-Food Corporation and The Stuart Company and Arthur Hanisch as third party? A. It is.

Mr. Mackay: Your Honor, I should like to offer a copy of this agreement in evidence.

Mr. Maiden: No objection, if the Court please.

The Court: It is received as Exhibit 12.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 12.)

Q. (By Mr. Mackay): Now, I will ask you, Mr. Hanisch, if prior to the execution of that agreement there was a dispute between The Stuart Com-

(Testimony of Arthur Hanisch.)

pany and The Vita-Food Corporation with respect to the ownership of the trade mark, the validity of it? A. No.

Q. I will ask you if The Stuart Company claimed ownership [104] of the trade mark at that time.

A. We did, but we never brought it to the dispute point.

Q. What were your grounds for claiming ownership of it?

A. Our grounds for claiming ownership were based upon the opinion of our attorney.

Q. Hazard & Miller?

A. Hazard & Miller.

Mr. Mackay: Now, if your Honor please, I should like to offer this opinion in evidence for this purpose: The application, as I shall later show, was filed by The Vita-Food Corporation, and in that application, in order for it to get the registration, it represented to the Federal Government that The Vita-Food Corporation for more than a year past, at least one year, had sold exclusively products under "the Stuart formula" in interstate commerce.

The Court: What do you mean, under the name, "the Stuart formula"?

Mr. Mackay: Yes, your Honor.

The Court: You see, this morning that was very confusing. If you say it owned the Stuart formula, that means it owns the formula. If you say it claims to have owned a name, quote, "the Stuart

(Testimony of Arthur Hanisch.)

formula," unquote, that is an entirely different matter.

Mr. Mackay: Yes, your Honor. [105]

The Court: Because I suppose that you could sell licorice, baking powder, cough syrup, tooth powder, or anything you wanted to under the name, quote, "the Stuart formula", unquote, but you could only sell the Stuart formula if you owned the Stuart formula. Now, you are talking about contentions that The Stuart Company owned the name, is that it, Mr. Mackay?

Mr. Mackay: Owned the trade mark, just the trade name.

The Court: Would you use that expression, "the trade name," so that when we read the record you don't mean by "the trade name," quote, "the Stuart formula," unquote, the product?

Mr. Maiden: Your Honor, it is a trade mark.

Mr. Mackay: It is a trade name.

The Court: I don't know whether it is a trade mark or what it is.

Mr. Maiden: If the Court please, the name "the Stuart formula" was a trade mark.

The Court: What are you arguing about? Mr. Mackay answered my question and we are ready to go on.

Mr. Mackay, I was saying something. I think you are arguing your case at this point, and I don't think it is the right time for you to do that. Will you now resume your statement, Mr. Mackay? [106]

Q. (By Mr. Mackay): I think you have iden-

(Testimony of Arthur Hanisch.)

tified this instrument as being the opinion of your trade mark counsel? A. It is.

Mr. Mackay: I should like, if your Honor please, to offer this in evidence for the purpose of showing, at least in the minds of The Stuart Company officials, that the trade mark which had been obtained by The Vita-Food Corporation was invalid, and that therefore, as we shall later show, little importance was attached in the final settlement to this particular trade name.

Mr. Maiden: If your Honor please, I object to it upon the ground it is incompetent, irrelevant, and immaterial. I don't propose to be bound in this case by the opinion of any attorney as to whether or not this company had the valid ownership of the trade mark, "the Stuart formula." This Court is not called upon in this case to determine that particular point. The Court has no jurisdiction. The Court is only concerned here with determining whether or not The Stuart Company acquired title to this trade mark, "the Stuart formula," from The Vita-Food Corporation.

Mr. Mackay: If I may make this observation—I am sorry.

Mr. Maiden: Now, if the Court please, many attorneys can have different opinions on legal questions, as your Honor [107] well knows. I don't believe that proposed exhibit has any place on earth in this lawsuit.

Now, Mr. Hanisch has already explained that he had an opinion from an attorney telling him, or to

(Testimony of Arthur Hanisch.)

the effect, that the trade mark was not properly registered in the name of The Vita-Food Corporation. There is no need on earth for the opinion itself to be in evidence. I think it is absolutely incompetent. It deprives me of the right to cross-examine the authors of that opinion, and it allows evidence in the case without giving me an opportunity to be presented face to face with the testifying witness and subject him to cross-examination.

I submit it is incompetent, and I also submit that it is beyond the scope of the issue in this case; a wholly irrelevant matter.

Mr. Mackay: If your Honor please, I would like to make this observation: I am not asking this Court to be bound by this opinion. We are not here to determine whether that application was valid or invalid. I put it in for only one purpose, as I stated. Our big problem here, if your Honor please, is to show, as this Court has so many times held in cases of this kind, the intent of the parties, because we have a contract—this last exhibit—under which \$197,700.00 was paid. The Commission has taken the view that that is all for the acquisition of an asset. We take the opposite position. [108]

Now, this Court has held in numerous instances that you can show the intent, the factors preceding the agreement, to try to determine this very difficult question as to what portion of the payment did represent the acquisition of a capital asset, and that is the only reason why I put this in now.

Mr. Maiden: If the Court please, I understood

(Testimony of Arthur Hanisch.)

Mr. Mackay's case from the very beginning to be this: that the payments of these sums of money to The Vita-Food Corporation were in consideration of the cancellation of a contract of May 5, 1941.

Now, do I understand Mr. Mackay's contention to be that the consideration for the payment of these moneys to The Vita-Food Corporation was to perfect or quiet title to this trade name in The Stuart Company?

Mr. Mackay: Oh, no, quite the contrary.

Mr. Maiden: I don't see what this has to do with the picture at all.

Mr. Mackay: We are merely showing, if your Honor please—if I may be permitted to go to that last contract—it merely states there that the Vita-Food has quit claiming any interest it may have in the trade-mark. Now, since it does that, and since the Government has some indication there, and based its whole case upon it, that we were buying its trade-mark, we have got to determine what the intent of the [109] parties was, merely for the purpose of showing what those expenditures remaining were. The purpose of this is this: to prove that these parties who entered into this contract never regarded that trade-mark of sufficient importance to justify a large expenditure of money or the sum specified in that contract. It is trying to prove to your Honor, and it is my contention, that the monies paid here were in cancellation of the contract, and that this was just put in there, and got a quit-claim of it like any lawyer would put in a little sur-

(Testimony of Arthur Hanisch.)

plus, to make sure, and that is the only reason I am offering it, for that limited purpose.

Mr. Maiden: Your Honor, that doesn't serve any purpose in the case as I can see.

Now, Mr. Mackay is taking the position before this Court that this company paid \$197,700.00 simply for the purpose of canceling the so-called onerous contract of May 5, 1941. Now he wants to inject into this case—which is perfectly agreeable with me, if he will stipulate to it—that the obtaining of a quiet title by The Stuart Company of this trademark was the consideration for the payment of this money. Now, the cases are very clear that expenditures incurred in connection with defending or perfecting title to property constitute a cost of the property and are not deductible expenses.

I just don't see where this has anything on earth to do with the case, so far as I understand Mr. Mackay's position [110] to be.

Mr. Mackay: Well, counsel, we have got to interpret that contract, if your Honor please, we have got to determine what was in the minds of the parties at that time, and what they were dealing with, and I don't see how else I can do it. For that purpose I think it is competent and material.

Mr. Maiden: I object to it on the grounds it is incompetent; it deprives me of my right to meet face to face and cross-examine the authors of this document.

Mr. Mackay: It merely shows what our parties had in mind when they were making this contract.

(Testimony of Arthur Hanisch.)

Mr. Maiden: I think Mr. Mackay has the idea of getting some sort of opinion in this case by some lawyer, with a lot of cases cited, and for some influence he thinks it might have in this case.

Mr. Mackay: I am merely following the rule of the Court here, as they have done in so many other instances in this kind of a contract, in trying to determine the intention of the parties when they made the contract, because the Commissioner has held many times that on a question of income subject to taxation the real intention of the parties and the nature of the transaction may be shown by evidence outside the contract. Now, I put it in for that limited purpose. It seems to me it is quite competent. That was affirmed in the Circuit Court of Appeals in the case of Commissioner of [111] Internal Revenue vs. The Proctor Shop, Inc., 82 Fed. (2d) 792.

Mr. Maiden: If Mr. Mackay wants to get this opinion into evidence, let him present the lawyer who prepared it. Let him testify and submit himself to cross-examination. I say it is incompetent otherwise. This witness, of course, didn't prepare it. He wasn't qualified to prepare it. I can't cross-examine on it at all, and, as I said before, I don't think it has anything on earth to do with the case, except that it does bear out Respondent's position that this settlement which is designated "Cancellation of contract" was in reality a document acquiring the property right of this trade-mark, which is a capital asset.

(Testimony of Arthur Hanisch.)

Mr. Mackay: Well, if we were here—if the Court had jurisdiction to determine whether that contract was valid or invalid, I think counsel's objection would be well taken. That is not the purpose. All we are here trying to do is get the evidence in there to show what these people did. We say that this evidence is to show what was in the minds of the parties.

Mr. Maiden: Well, your Honor, Mr. Hanisch has already stated that he had this opinion from an attorney. Now, it would seem to me that that would carry Mr. Mackay's point without putting the opinion in, itself.

The Court: Well, Mr. Clerk, mark this document Exhibit No. 13 for identification. [112]

(The document above-referred to was marked
Petitioner's Exhibit No. 13 for identification.)

The Court: The point is a difficult one, of course, whether or not the second and third parties to the agreement of settlement, which is Exhibit 12, that is, whether The Stuart Company and Mr. Hanisch attributed any value to the trade-mark. It could be just a matter of opinion. Whether they paid anything to get rid of the nuisance value that The Vita-Food Company could make out of being troublesome, and make out of the fact that they had gotten a patent, is another matter.

Mr. Mackay: I appreciate that, your Honor.

The Court: The opinion that Mr. Hanisch might offer in this case would be to a large degree self-

(Testimony of Arthur Hanisch.)

serving, because he is an officer of the corporation. We are in this difficult position of trying to decide whether we are really dealing with the intent of the parties to a contract or whether we are dealing with something else. I would say that the real objection to the offer of the proposed Exhibit 13 is that an adequate foundation has not been laid for it.

Mr. Mackay: It can be marked Exhibit 13 for identification?

The Court: It has been marked for identification.

Mr. Mackay: I think I can clear that up with a later witness and lay the foundation. [113]

The Court: You can lay your foundation. You have no doubt felt a little pressed for time, and I would say that some foundation could have been laid for Exhibit 12, if you would make a note of that. That is your agreement of settlement.

Mr. Mackay: Oh, yes.

The Court: There isn't any doubt about the fact that the agreement of settlement was entered into, but there isn't any testimony about the events actually leading up to the execution of the agreement.

Mr. Mackay: Yes, your Honor.

The Court: There isn't any evidence relating to how the parties arrived at the amount of the consideration which is stated in the agreement. Don't you see?

Mr. Mackay: I understand.

The Court: Well, now, if you don't lay a foun-

(Testimony of Arthur Hanisch.)

dation for the settlement agreement, and then you go on to an opinion—to an attorney's opinion—which has some bearing on one item covered by the agreement, you are vulnerable to all kinds of objections.

Mr. Mackay: Your Honor, I shall lay that foundation.

The Court: How many witnesses are you going to have, Mr. Mackay?

Mr. Mackay: Your Honor, I have at least three more witnesses besides Mr. Hanisch. It is going to take more than [114] just this afternoon.

The Court: Well, it is not going to, because we have no other time.

Mr. Mackay: I see. Well, I will try to work as fast as I can on it.

Q. (By Mr. Mackay): Mr. Hanisch, I will ask you if you participated with anybody of The Vita-Food Corporation in negotiations leading up to the contract of November 28, 1942. A. I did.

Q. With whom did you participate?

A. Mr. Oscar Wiseman.

Q. Mr. Oscar Wiseman, who was he?

A. He was the legal representative or counsel, and vice-president of The Vita-Food Corporation at that time.

Q. Who was president?

A. I imagine it was Paul Overton, but I don't know.

Q. Was anybody else present on your side?

(Testimony of Arthur Hanisch.)

A. No—my side? My attorney, Mr. Robert Dunlap.

Q. He was also secretary of the company?

A. Yes.

Q. Now, can you relate to the Court the substance of the conversations you had at that time with him? A. With Mr. Wiseman?

Q. Yes. [115]

A. We explained that it was impossible for us to operate under this contract. I explained the onerous provisions, the faulty merchandise, the fact that I could buy more advantageously in the open market, the fact that I felt there wasn't the financial responsibility in the company to stand behind bad merchandise, and I just could not continue to operate under that contract.

Q. What did they say? I mean, give the substance of the conversation.

A. We asked about—they asked about what we were willing to pay, and I said that I would like to make some type of installment payment based on the amount of merchandise we would sell, predicated upon a unitage basis.

Q. Upon a unitage basis?

A. That is correct.

Mr. Maiden: I just don't understand. Payment for what?

The Witness: Of this settlement agreement, the release from our contract.

The Court: Why didn't you sue them?

The Witness: Because, your Honor, of this: We

(Testimony of Arthur Hanisch.)

had that thing all set to go, and this was definitely in my mind, that where you are dealing with doctors, people in the medical profession, a suit of this kind—there were bad features about it, the faultiness of this product. We would have [116] dragged this thing through the mud and around the whole proposition.

The Court: Whose proposition?

The Witness: Our proposition, the whole deal, The Stuart Company, because a suit of that kind on a product that is being sold through doctors—it is a very sensitive type of product, and anything that is unsavory about a product that doctors are prescribing for a person's health is going to jeopardize and injure that business.

The Court: We will have a short recess for five minutes.

(Short recess taken.)

The Court: You may proceed, Mr. Mackay.

Q. (By Mr. Mackay): Mr. Hanisch, I think you were asked by the Court why you didn't litigate this matter, the disputes between you and The Vita-Food Corporation—The Stuart Company and The Vita-Food Corporation? A. Yes.

Q. What were your reasons?

A. My reasons were primarily that it was in revealing a lot of facts about bad products, about instability—we would not have tarnished anything but the name of The Stuart Company. As a matter of fact, we were prepared to go to suit in spite of that, as I will bring out later on. [117]

(Testimony of Arthur Hanisch.)

Q. Well, what in your opinion was the importance at that time of the trade-mark "the Stuart formula"?

A. None. As a matter of fact, it probably was in bad repute. The important thing in selling to the medical profession is to establish the reliability of the company. A name means nothing until the doctors have faith in the company that is selling it, and we are detail men. We are selling the reliability of The Stuart Company, and the reason they had faith in The Stuart Company—they liked our approach of selling a high-potency product at a lower price, and I think that is what established the faith of the medical profession in The Stuart Company. There certainly was no magic in the name "the Stuart formula" that made those doctors buy it. May I amplify? When I say the selling of value, I mean our basis of selling.

Q. Yes, go ahead.

A. It is a peculiar billing in the vitamin business that exists in very few businesses, in that you can completely evaluate the product. In other words, you say there is so much unitage of so many vitamins, and you can reduce that to an absolute dollar value. Now, all our sales approach was to the doctors, first to establish the reliability of The Stuart Company, secondly to show that we had a greater vitamin potency to offer compared to other products for less money.

Q. Now, Mr. Hanisch, did you have a chart that you used [118] in your selling program?

(Testimony of Arthur Hanisch.)

A. Yes.

Q. Is that the chart (indicating) ?

A. That is it.

Q. Was this in effect during that time ?

A. Yes.

Q. Can you explain that to the Court ?

A. This chart was prepared with the help of Dr. Borsook before we started operating our company, the idea being to show the doctors what vitamin value The Stuart Company had as compared to other products on the market, and we did not actually use the names of the competitors, but we identified them as "Manufacturer A," "B," "C," "D," and so forth. We did, however, state the exact unitage of all these competing products. We stated our unitage, and then we showed and worked out a factor using the Stuart as 100 per cent, and showed in dollar value what the consumer got of all the competing items, and that was our entire sales approach. As a matter of fact, the name "the Stuart formula" can hardly be seen on this whole sheet.

Mr. Mackay: If your Honor please, I should like to offer this in evidence.

Mr. Maiden: No objection, if the Court please.

The Court: It is received as Exhibit 14.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 14.) [119]

Mr. Mackay: If your Honor please, we may

(Testimony of Arthur Hanisch.)

have to withdraw that and get a photostatic copy made. I assume it would be all right.

Q. (By Mr. Mackay): I think you have already stated that you put \$1,000.00 in The Stuart Company originally for stock?

A. And agreed to loan the company its necessary operating capital.

Q. Did you loan the company money to operate on? A. I did.

Q. How much did you loan from the beginning until the cancellation contract?

A. At the time of the cancellation the company owed me approximately \$70,000.00.

Q. Had you taken a salary during this time?

A. I had not.

The Court: Which company owed him \$70,000.00?

Mr. Mackay: The Stuart Company, for moneys advanced.

Q. (By Mr. Mackay): Now, did The Vita-Food Company at any time ever disclose to you any secret process for the production of what is known as "The Stuart Formula"?

A. No, we were absolutely not allowed to ask where their plant was. I have never seen it, and no member of our organization ever knew where it was. There was no secret formula, [120] and in the settlement agreement there was no transfer of any formula of any kind.

Mr. Maiden: What agreement are you talking about, Mr. Hanisch?

(Testimony of Arthur Hanisch.)

The Witness: I beg your pardon?

Mr. Maiden: What agreement are you talking about?

The Witness: In the cancellation agreement.

Mr. Maiden: You say "The Stuart Formula" was mentioned in the cancellation agreement?

The Witness: "The Stuart Formula" as a trade name was mentioned. There was no mention of a secret formula for making a vitamin product, and there was no transfer of such a thing.

Q. (By Mr. Mackay): Well, did you know whether there was ever such a secret process?

A. There might have been in the minds of the people, but the fact remains that we had three other people who said they could make it, and two have made it for us. As a matter of fact, an improved product. [121]

Q. Now, referring to the settlement contract, Exhibit 12, and particularly to Paragraph 8 on page 4 of that agreement——

A. What paragraph? 10?

Q. Paragraph 8.

A. There is no Paragraph 8 on this page.

Q. I guess my bifocals aren't working.

A. Oh, yes, that is correct.

Q. My bifocals are working. Now, that Paragraph 8 in substance states that you are the owner of at least 51 or more per cent of the then outstanding stock of The Stuart Company?

A. Yes.

(Testimony of Arthur Hanisch.)

Q. It also states that you will retain and maintain the ownership of 51 per cent or more of the outstanding capital of the stock until the first party is fully paid and also that you would remain as its managing agent. Now, I will ask you at whose insistence was that paragraph put in the contract?

A. That was at the insistence of Mr. Wiseman of The Vita-Food Corporation.

Q. Do you know why that was insisted upon?

A. Mr. Dunlap and I felt, and they were told—they told us that they had confidence in the management as it existed, because they state that in the contract. I objected most of the evening to discussions on this cancellation [122] agreement centered around this point for one reason, that I was very loath to tie myself up to that management agreement for the length of time involved because of my record of T.B. history, and after we did make objection, they brought in the clause in case of my death or in case of incapacity, that that part of it would be waived. However, it was a very important issue to me, and indicated very strongly to Mr. Dunlap and to me that the important part of what they wanted was not that they felt that the trademark “the Stuart formula” had any magic that would make this business go, but they felt it was completely in the way of management, and I think it is indicated by that length of the contract.

Mr. Maiden: If the Court please, I object to that as being a conclusion of this witness, and ask that it be stricken from the record.

(Testimony of Arthur Hanisch.)

The Court: The objection is sustained and the answer is stricken.

Just read that question again, and Mr. Hanisch, you limit your answer to the question.

(The question was read.)

The Court: There is nothing in Paragraph 8 about remaining as the manager of The Stuart Company, Mr. Mackay.

Mr. Mackay: Yes, your Honor, I am sorry.

The Court: What other paragraph is that in?

Mr. Mackay: I would like to withdraw both questions [123] because it is in Paragraph 5. I am sorry, your Honor, but in my haste here I should have referred to Paragraph 5.

The Court: Instead of 8?

Mr. Mackay: Yes.

The Court: Then, will you reframe your question?

Mr. Mackay: Yes.

Q. (By Mr. Mackay): Now, Mr. Hanisch, I call your attention to Paragraph 5 of the agreement of November 28th, 1942, wherein you as third party represent and warrant that you are the owner and will retain and maintain the ownership of 51 per cent or more of the outstanding capital stock of said company unless the first party is fully paid in accordance with this agreement, and that you further represent and warrant that you are the managing agent in full charge of business affairs of second party.

Then the agreement provides further, should the

(Testimony of Arthur Hanisch.)

third party—that is you—at any time fail to maintain his stock ownership and control or fail up to and including October 15, 1946, to continue as said managing agent of said second party, then and in either such events, third party will forthwith pay to first party the then outstanding balance unpaid to first party, and so forth.

Now, I will ask at whose insistence was that paragraph inserted in the contract? [124]

A. At the insistence of Mr. Wiseman.

Q. Was there considerable discussion about that paragraph? A. A great deal.

Q. It was between you and Mr. Wiseman?

A. That is correct, and Mr. Dunlap, also.

Q. What was the substance of the contract?

A. The substance was that I very much objected to tying myself up to that length of management term, particularly because of the fact that I had had a record of five years of tuberculosis, and I felt that it might be too much of a strain at some place along the line, and I might want to get out. They finally—he finally agreed on the provision, which in case of my incapacity, mentally or physically, or in case of my death, that particular clause would be waived.

Q. Now, I call your attention to Paragraph 7. That is shown as an insert in there——

Mr. Mackay: Your Honor, I want to apologize to the Court. We put in a true copy of this agreement, and in copying, the stenographer has not put in the insert that was there.

I would like to call your attention to the original

(Testimony of Arthur Hanisch.)

there in Paragraph 7 where it says and shows an insert:

“In the event of the abandonment of said trade-mark ‘The Stuart formula’ by Second Party——”

and it is initialled by each one of the parties to the contract, Mr. Wiseman and Mr. Hanisch. I should like to have the privilege of rewriting that particular paragraph and show the insert as it is.

The Court: You may do that, Mr. Mackay.

Mr. Mackay: It will be an exact duplicate.

Q. (By Mr. Mackay): Now, I will ask you, Mr. Hanisch, at whose insistence was that insertion placed in the contract?

A. At the insistence of Mr. Wiseman.

Q. Now, Mr. Hanisch, you have stated that the product that you were marketing prior to the cancellation was an inferior product because it would explode and you got bad reactions from the doctors and druggists and consuming public. Now, I will ask you if after the cancellation of this contract that product was changed? A. Yes.

Q. In what respect?

A. The Vitamin content remained the same, but the base of the product, that is, the vehicle in which the vitamins was contained was changed from molasses to primarily a malt base with no molasses.

Q. Did that eliminate the difficulty that you heretofore had? [126]

A. It eliminated the three difficulties, the explo-

(Testimony of Arthur Hanisch.)

sion, the frothing and the fact that it created digestive disturbance, and the fact that people could not tolerate the taste. The fact is that molasses is a very sweet sickening thing, and the people will take it to start, but after they have taken it for two or three weeks the taste becomes sickening, and we were losing customers, and we eliminated that.

Q. Since the cancellation of that agreement, have you been able to buy vitamins with the vitamin content in that product cheaper than you had bought from Vita-Food?

A. Very much cheaper.

The Court: What do you mean? You asked the question after the cancellation agreement—was the product changed?

Mr. Mackay: Yes, your Honor.

The Court: I don't think you mean that question just in the way you say it. Now, The Stuart Company wasn't manufacturers, so it didn't have any product to change, did it? We don't know whether Vita-Food continued to sell vitamins and changed its formula and sold the formula to someone else. Now, do you mean to ask him a question—well, you see what I mean.

Mr. Mackay: I get your point. Thank you, your Honor. [[127]

Q. (By Mr. Mackay): I will ask you, Mr. Hanisch, if after the date November 29, 1942, the date of the cancellation of this contract, whether the Stuart Company purchased any more products from the Vita-Food Corporation.

(Testimony of Arthur Hanisch.)

A. At the time of the settlement we took in some orders that were on the books at that time, but we did not purchase, as I recall it, any additional orders after that time.

Q. Well, after that, then, where did you get your supply from?

A. William T. Thompson Company.

Q. Were they connected in any way with the Vita-Food Corporation?

A. They were not.

Q. Did you get the products there at a substantially lower price than you had been paying for them?

A. At a very substantial saving.

Q. How much, can you tell the Court?

A. Our first order—I would like to ask Mr. Dunlap if I could get a sheet that I have that written on. These are figures. Is it in order just to read this note?

The first tablets Thompson billed to us on December 14, 1942, were without Vitamin C, but on December 4, 1942, Thompson's quotation was 53.9 cents per bottle of 96 for the same tablet with C as we were getting from the [129] Vita-Food at 87 cents; 53.9 as against 87 cents.

I have a projection of that indicating that the saving at the Thompson price for the length of time we had done business with Vita-Food, which was a little over a year and a half, would have been \$99,617.00 on that basis.

Q. Now, Mr. Hanisch, did you ever receive a formula from the Vita-Food Corporation?

(Testimony of Arthur Hanisch.)

A. Never received a formula.

Q. Was a formula ever disclosed to you?

A. No.

Q. Now, after the settlement agreement, did you change your labels? A. We did.

Q. In what respect? I call your attention to Exhibit 9. Will you please call the Court's attention to the changes you made?

A. The important change and the significant change we made in the label was in the preamble statement under the name "the Stuart formula," and the statement as it was originally when we were purchasing from Vita-Food was "An aqueous concentrate derived from natural food sources, fortified."

The change after we went to the new product was "the Stuart formula, a balanced high-potency multivitamin concentrate." [129]

Now, the reason for that change was this—and it has significance: The above are samples of labels used on the original formula last purchased from The Vita-Food Corporation during the month of February, 1943, and being on the new formula as made subsequently by the William T. Thompson Company and others. It should be noted that the copy under the name of "the Stuart formula" on Sample A, reading: "An aqueous concentrate derived from natural food sources, fortified" was changed to read, "A balanced high-potency multivitamin concentrate," because it was believed by experts to be misleading and subject to Food and Drug violations. [130]

(Testimony of Arthur Hanisch.)

The reason for that—I might amplify what that was—that the implication as a result of the information we have obtained from Vita-Food was that we were selling primarily a natural product, which was not the case. It was merely a synthetic product.

Q. Mr. Hanisch, the contract of cancellation, I think, stated that whatever stock Mr. Lewis had would be transferred to you?

A. That is correct.

Q. Stock of The Stuart Company?

A. That is correct.

Q. Now, how much was transferred, do you remember, at that time?

A. As I recall it, it was whatever Mr. Lewis' interest was, which, as I remember, was 15 per cent.

Q. Yes. Now, what in your opinion was the value of the stock at that time?

Mr. Maiden: Your Honor, I object to that. There has been no basis in the record here for this witness to express his opinion as to the value of the stock at that time. The witness is not shown to be qualified to express an opinion as to the value of the stock.

Mr. Mackay: Well, if your Honor please, I think that the returns of the company, the evidence already in showing continued losses, showing the liability to him of [131] \$70,000.00, showing poor products is about sufficient to show that the stock had no value, but there is one rule of law that is very definitely set, that a president of a company or an owner of stock can testify as to what, in his

(Testimony of Arthur Hanisch.)

opinion, is a fair market value. I insist that it is a proper question.

Mr. Maiden: It is nothing on earth but a self-serving declaration of this witness.

The Court: Overruled.

The Witness: It had no value whatever.

Q. (By Mr. Mackay): Well, what in your opinion was the fair market value of the trade name at that time?

A. The trade-mark "the Stuart formula"?

Q. Yes.

A. It had no tangible value to us whatever, insofar as—well, it had no realistic value. Let me explain it this way: As a matter of fact, we had considered using the name "The Stuart Company" and calling it "Stuart Vitamins" because of the bad repute of the product we had. However, I estimated what it would cost us to change the name of the product to a name like "Stuart Vitamins", and it would have cost us—and I have a figure, may I refer to that figure—I estimated that at the time we were considering making that change to a new name, and all of our men agreed that this would have been the cost, we would have had to make a notification to all the doctors [132] who were on our mailing list at that particular time, and also to our drug outlets. The number of doctors we had at that time was 17,428. The number of drug outlets we had was 6,746. Our estimate of what that cost would have been was predicated on this: Our men had to call on the doctors anyway. They would have

(Testimony of Arthur Hanisch.)

informed them verbally, so there was no added expense on that particular point. However, we felt that the mailing of advice to each one of our doctors—to each one of our drug stores would have been ample notification to make them aware that there had been a change. Those mailings through our experience have cost us six cents apiece, so that the total cost of that mailing would have been \$4,713.00.

We also, at that time, had 11,700 bottles of merchandise on hand which would have had to be relabeled. There Lewis or the Vita-Food Corporation at that time was charging us 10 cents to do relabeling. For that reason we used the figure of a cost of 10 cents which would have involved changing this label to a new name, which comes out \$1,170.00.

In addition to that there would have been the work and experience—art work of getting up our new labels with a new name, which we estimated at \$1,000.00.

That is a total figure of \$6,883.93, which I think is a very fair estimate.

But assume that you double or triple it. I would say that is an absolute outside figure of what a change to another name [133] would have involved.

Q. Well, have you some idea about what the total sales of the vitamin industry were about that time?

A. It was in a terrifically growing period at that time. I am not qualified to give you the exact figure.

(Testimony of Arthur Hanisch.)

Q. Would you have any idea as to what the percentage of the sales of your product was to the total?

A. Infinitesimally small, but I have no figure.

Mr. Mackay: You may take the witness.

Cross-Examination

By Mr. Maiden:

Q. Mr. Hanisch, when did you first meet Mr. Lewis and under what circumstances?

A. As I recall it—I am not clear whether it was December of '41 or——

Q. You mean December of 1940?

A. December of '40 or January of '41. It was one of those two months. The circumstances were this: That Mr. Charles King, who was a reporter for the Pasadena Post, and who knew Dr. Borsook had arranged the meeting with them. We met with Mr. Pringle, one of my associates at the Annandale Country Club for lunch.

Q. I believe you already explained on direct examination that you were interested in entering some business field out here in California at that [134] time?

A. That is correct.

Q. Mr. Hanisch, what was your past business experience?

A. I had gone to England. I spent three years there organizing the subsidiary of a hosiery manufacturing company. In 1921 I formed, with my brother, the Vogue Hosiery Company, and im-

(Testimony of Arthur Hanisch.)

ported machinery for the manufacture of infant hosiery, and I was in that business and in the merchandising and I also was a member of a corporation in New York which merchandised that hosiery. I was very active, almost exclusively, in that field of merchandising and manufacturing until 1932, when I came to California, having contracted T.B.

Q. But you had had a long and active business career in an executive capacity in respect to manufacturing and selling corporation prior to 1941?

A. Not selling corporation, selling products made by a corporation.

Q. Now, Mr. Hanisch, at that time I believe you stated that the vitamin field was entirely new to you?

A. Completely new.

Q. You were referred to the Vita-Food Corporation as being a corporation that at that time was manufacturing and selling a vitamin concentrate, is that correct?

A. That is correct.

Q. And with the view of becoming a seller to the retail trade of that vitamin concentrate? [135]

A. That is not completely correct, not to the retail trade. Through wholesalers to the retail trade.

Q. Through wholesalers to the retail trade. You then discussed with Mr. Lewis of the Vita-Food Corporation the proposition of your entering into a contractual relation with Vita-Food Corporation which would enable you to become a distributor of the concentrate that was being manufactured by the Vita-Food?

A. That is correct.

Q. Now, on February 3, 1941, is it true that

(Testimony of Arthur Hanisch.)

you purchased 3,000 gallons of this vitamin concentrate from the Vita-Food Corporation?

A. I am not sure of the exact date in February, but it was in February, 1941.

Q. On March 7, 1941, did you make a further purchase? A. That is correct.

Q. Of 3,000 gallons of this concentrate?

A. That is correct.

Q. Now, was it the understanding at the time you made this two purchases of vitamin concentrate that you would cause two separate corporations to be organized, that you would transfer this gallonage of concentrate to these corporations?

A. That is correct.

Q. And that those two corporations then would sell the product? [136] A. That is right.

Q. Now, the Shaler Food Products Company and The Stuart Company were organized in March of 1941 at the same time, I believe you stated?

A. That is correct.

Q. I will ask you if the date of organization wasn't March 27, 1941?

A. I could not give you the exact date. I know approximately when it was.

Mr. Mackay: If you say, we will so stipulate.

Mr. Maiden: That is true.

It may be stipulated, if the Court please, that the Shaler Food Products Company and The Stuart Company were organized on March 27, 1941?

Mr. Mackay: Right.

Q. (By Mr. Maiden): Now, Mr. Hanisch, did

(Testimony of Arthur Hanisch.)

you and Mr. Lewis discuss the name that would be used by these corporations for the concentrates that were to be sold by you?

A. We did. The major part of my discussion on that, however, was with Mr. Pringle, who was one of the executives of Lord & Thomas, the advertising agency.

Q. Just what was your understanding about the name that was to be used to sell these products under?

A. Understanding in what respect? [137]

Q. As to what names would be used and who the names would belong to.

A. We, in our discussion felt that simplification—the name of the company was the primary thing in my mind, and rather than get some trick name such as Multiceben or Hexylresorcinol we would get a more personal name. I had not been familiar with merchandising under trade-mark brands. We never had had one in my hosiery business, so I placed very little emphasis on the business of trade-marks. To me it was a matter of merchandising and management.

Q. You say you had been in business for some 15 or 20 years prior to 1932? A. Since 1921.

Q. You had not become aware in all that time that a trade-mark was a valuable asset?

A. Oh, no, I did not say that. I said my own company had never subscribed to the theory of merchandising trade-marked merchandise.

(Testimony of Arthur Hanisch.)

Q. But as a business man did you appreciate the value of a trade-mark?

A. A trade-mark certainly must have value because a trade-mark produces profits. A trade-mark must be one contributing factor to the creation of products, which may be merchandising, management and trade-mark. I think it would be very difficult to isolate it, but it would be foolish to say [138] it would not have some value.

Q. You were interested, of course, in giving the product that you were going to sell a name?

A. It had to be a name in this respect: A name to me in the business of an ethical operation is—the important thing about a name, and Squibbs use this very succinctly as that terminology, “know the namer”.

The name is important to Squibbs and names within the Squibb line of 200 products is just a matter of differentiating in the doctor's mind between those products rather than to make it stand out in the eyes of the consumer.

Q. Now, Mr. Hanisch, did I understand you to state on direct examination that the name “The Stuart Formula” was not in existence at the time of the execution of the May 5, 1941, contract?

A. I believe the name had been—we had decided to use that name before the execution of the contract. I am not too definite on that. It was very close in there.

Q. Who was responsible for choosing the name “The Stuart Formula”?

(Testimony of Arthur Hanisch.)

A. It was a combination on conferences. Mr. Lewis sat in on one or two of them. The primary conferences were with Mr. Pringle of Lord & Thomas and Mr. Liesman of Lord & Thomas. I had felt that we should have a proper name. As I explained this morning, I couldn't very well use my name because of [139] practical difficulties of spelling. We therefore decided on using the expedient of using my children's names, and there Mr. Liesman supplied the added business of "formula" to tack on to "Stuart."

Q. According to your testimony the Vita-Food Corporation had nothing on earth to do with choosing that name, is that right?

A. I wouldn't say that completely, because Mr. Lewis was in on the conferences, and I think Dr. Borsook also was aware of it and approved it.

Q. I want to get one thing straight, if I can. You don't claim that you are responsible, you and your associates, are responsible for the name of "The *Stewart* Formula"?

A. I think we had a great deal to do with it.

Q. Did the Vita-Food Corporation, that is, Mr. Lewis, have a great deal to do with it?

A. I, of course, don't know what went on in the discussions within the Vita-Food Corporation. I do know that Mr. Lewis was in on meetings that we had when we were considering the trade name.

Q. He contributed to the origination of that name, "The *Stuart* Formula"?

A. He sat in on the meetings. Now, whether the

(Testimony of Arthur Hanisch.)

contribution of the name itself was his or not, I am not too sure. However, I am inclined to tell that the name "Stuart" was a [140] thing hit upon by Mr. Pringle and I do know that the "formula" was hit upon by Mr. Horace Liesman of Lord & Thomas.

Q. Now, isn't it a fact that Mr. Lewis himself was responsible for the name "Stuart" being in that trade name?

A. I am not sure, but I don't believe that to be true.

Q. But you don't deny it, you just say that you don't believe it to be true?

A. I am not sure on that point. [141]

Q. Now, Mr. Hanisch, prior to the execution of the contract of May 5, 1941, was it your understanding that the trade name or the name under which the products that you were to sell, were to be sold, would be the exclusive property of The Vita-Food Corporation?

A. It was, for this reason: That, if I felt that I could justify my faith in the men I was doing business with, the other elements of the contract had little or no significance.

Q. In other words, it was your understanding and your agreement, from the beginning, that the trade name under which your articles would be sold, were to be the property of The Vita-Food Corporation and that you laid a claim to that property?

A. That is correct.

Mr. Maiden: Now, in order to fill in some gaps

(Testimony of Arthur Hanisch.)

that might be needed by the court, I think it well that we should put in these contracts of February 3, 1941, and March 7, 1941. I might state, if your Honor please, that these contracts are really in the form of letters, written to Mr. Hanisch, Vita-Food Corporation, providing at the end of each letter a place for the acceptance by Mr. Hanisch of the terms set forth in the letters.

Mr. Mackay: No objections to that. We have copies here. I really would like to put them in myself. I say, I [142] have no objection. I have copies of them.

Mr. Maiden: I would like to have them. You put in the original. Let's see, that is right, March 7.

Mr. Mackay: And February 3rd.

Mr. Maiden: I would like to at this time offer in evidence as Respondent's Exhibits A and B, the contracts of February 3, 1941, as Respondent's Exhibit A and the contract of March 7, 1941, as Respondent's Exhibit B.

The Court: May be received.

The Court: The one of February, is that it, Mr. Maiden——

Mr. Maiden: The one of February 3rd would be A and the one of March would be B.

(The documents above-referred to were received in evidence and marked Petitioner's Exhibits Nos. A and B.)

The Court: Off the record.

(Testimony of Arthur Hanisch.)

(Discussion off the record.)

The Court: On the record.

Q. (By Mr. Maiden): Now, Mr. Hanisch, when you first approached Mr. Lewis with respect to this type of arrangement, was Mr. Lewis immediately interested in entering into such an arrangement with you?

A. It isn't correct to say that I approached Mr. Lewis, [143] because Mr. King had told Mr. Lewis about me and Mr. King asked me whether I was interested. I said that I was, if I could prove certain points about the product, and he arranged a meeting with us. I never went to Mr. Lewis, so the question, as you phrased it, isn't completely a correct statement.

Q. Well, you say you were interested in proving the quality of the product?

A. Oh, no, I was interested in seeing who was behind it and seeing what the nature of the thing was. You see, I knew nothing whatever about it until my first conversation with Mr. Lewis.

Q. Did you make any investigation of The Vita-Food Corporation before you entered into the agreement of May 5, 1941?

A. I attempted to, without very much success.

Q. What sort of an investigation did you undertake, Mr. Hanisch?

A. I gave Mr. King—well, in the first place, I tried to get a financial report, which was not avail-

(Testimony of Arthur Hanisch.)

able because they never submitted a financial statement to Dun & Bradstreet or any others.

Secondly, I listed about seven points that I wanted verified, and I recall one. I wanted to see the plant, to see whether they had sufficient finances and equipment to provide for expanding business. I wanted, primarily, to find out whether they had the finances that were capable of, not only [144] taking care of production, but taking care of bad merchandise that I might have to take back, for which they were responsible; taking bad merchandise back, for which there was a food and drug responsibility. I was very interested, and another thing, according to the way I had to pay for this merchandise, the matter of financial responsibility was a very important one, because I made a prepayment of 50 per cent when I placed the order, before I got the merchandise.

I had no way of earmarking the raw materials as mine, and the contract states, as far as they——

Q. Just a moment. You are getting far off the question. A. I am sorry.

Q. I want to move along——

A. What I am trying to tell you, that is the type——

Q. I want to know what investigation you made and what did you find out, with respect to the financial responsibility of Vita-Food Corporation, prior to entering into the contract.

A. I listed six or seven points which I had asked Mr. King to take to Dr. Borsook and Mr.

(Testimony of Arthur Hanisch.)

Lewis. They assured me that their financial situation was all right. They had the facilities, equipment to manufacture; they had assets and controls which were very important.

Then, I went further, and this is not in reference to Vita-Food, but I did make a considerable check on Dr. Borsook through people I knew at Cal-Tech. That is about the [145] extent of it, though.

Q. I believe you stated that you wanted to see the plant and equipment? A. That is right.

Q. Did I understand you to say, on cross-examination, that you never did see this plant?

A. Never did see the plant.

Q. Why were you willing to sign that contract of May 5?

A. I had a great deal of faith in the academic standing of a man in Dr. Borsook's position, and my whole idea in signing that contract was faith in a man of his academic standing.

Q. Do I understand that you are, in any way, possibly impugning the integrity of Dr. Borsook?

A. I am not at all. I am telling you why I signed the contract. Everything I checked on Dr. Borsook was very good.

Q. Have you found out anything to the contrary? A. Not anything.

Q. Now, in other words, notwithstanding that you had—was it seven points?

A. Approximately. There was a list.

(Testimony of Arthur Hanisch.)

Q. A list of things that you wanted to find out about The Vita-Food Corporation?

A. That is correct.

Q. You simply wound up by taking the word of Dr. Borsook and Mr. Lewis, with respect to each one of these points? [146]

A. Primarily, yes.

Q. And you made no other or further investigation or check?

A. That is true. However, I went to my lawyer and told him what I was doing. He suggested I do not sign this contract. He said it was not realistic. I said, "It makes no difference, because I have faith in what Dr. Borsook has told me, and I have faith in his standing."

Q. Now, are you leaving the impression, Mr. Hanisch, I don't mean to be impertinent, but are you leaving the impression, so to speak, that you were kind of a "babe in the woods" in respect to this contract?

A. I may have seemed that way; however, I have known people in academic circles and I remember when Dr. Borsook—I asked him, "What do you want out of this?" He said, "I want nothing whatever out of this." I said, "That is a very unusual arrangement." He said, "Then, you don't know people in academic circles." I said, "I happen to have gone to college for a few years, and I do know them and have respect for them."

Q. So far as you know, Dr. Borsook never received one dime out of the arrangement?

(Testimony of Arthur Hanisch.)

A. I haven't any idea. I had nothing to do with Vita-Food business.

Q. You never paid him anything? [147]

A. No.

Q. Now, were you represented by a lawyer or anyone else in the drafting of this May 5th contract?

A. The contract was drafted by Vita-Food people, by their attorney, I assume, and there was an original one submitted, in which Mr. Pelletier and Mr. Pringle and I consulted with Mr. Lewis. We made some revisions and changes. We tried to get others, which were not revised, and Mr. Pelletier, who is the president of the Purex Corporation and one of our directors, objected very vehemently to my going into an agreement. I said, "Well, a person who hasn't gone to college don't know people in that field. Please believe me, I am doing this as a matter of good faith."

Q. Are you intending to leave the impression here that Dr. Borsook represented that he had an interest in The Vita-Food Corporation?

A. I am not.

Q. Did he represent to you that he had any control over The Vita-Food Corporation?

A. None whatever. He said that he had faith in their ability to manufacture, and he decided to turn this process over to them for manufacturing, as he decided to turn it over to us for merchandising.

Q. Now, how long would you say that negotia-

(Testimony of Arthur Hanisch.)

tions went on in the drafting of the actual final document of May 5, 1941? [148]

A. Well, it is rather difficult for me to give you a definite answer on that. I imagine they started about the time of our—it would have been about the end of March.

Q. About the end of March? A. Yes.

Q. Were there several drafts of the proposed final agreement written?

A. I wouldn't know what they wrote before it was shown to me. As I recall, there was one draft before we had the revised final.

Q. Did you read every bit of the agreement?

A. I went over it carefully.

Q. Did you approve of the agreement?

T. I beg your pardon?

Q. I say, you approved of the agreement?

A. In this way: I felt that there were onerous things in it, if I were in the hands of unscrupulous people. Again, I went back to my faith in Dr. Borsook. It isn't the type of agreement in an ordinary business transaction, with ordinary business people. That is no reflection on business people, either.

Q. However, I believe this agreement of May 5, 1941, is an agreement between your two corporations and The Vita-Food Corporation, and I don't believe that Dr. Borsook is a party to this agreement. [149]

A. Absolutely not. He knew the nature——

The Court: What did your faith in Dr. Bor-

(Testimony of Arthur Hanisch.)

sook have to do with whether or not Vita-Food Corporation was or was not a reliable concern? That is what we don't understand.

The Witness: Do you want me to answer that?

The Court: Well, yes, go ahead, if you have an answer.

The Witness: My signing this kind of an agreement was predicated on Dr. Borsook's recommendations of The Vita-Food Corporation and the men connected with them. Therefore, I went into the contract.

The Court: What did he know about them?

The Witness: I wondered about that, because they did not perform productwise or otherwise, the way he represented, and then came my disillusionment some time afterward.

Q. (By Mr. Maiden): When did this disillusionment strike you, Mr. Hanisch?

A. About the first time that a bottle of our material blew up, probably a month after we were in business.

Q. You say about a month after you commenced selling this? A. I say that roughly.

Q. Oh, I understand that it is just an approximation. That would be then in the spring or the summer of 1941?

A. June or July, 1941. [150]

Q. Did these bottles keep popping all through 1941?

A. We had explosions right along and then—I don't know how long—there were several stories

(Testimony of Arthur Hanisch.)

told me of a way by which this could be corrected.

The Court: All right, now, the point of this question is: We have in evidence an exhibit, which is Exhibit 5. It shows the amounts you paid Vita-Food Corporation during 1941, 1943, and during the whole year 1944 and during three months in 1945, and you paid \$16,000.00 up to March, 1943; \$52,787.15 up to March, 1944, and \$90,262.96 to March, 1945.

You have testified that one month after you entered into this agreement with Vita-Food, products began to go bad and bottles began to explode, and it was very embarrassing to you to have your customers tell you that you had sold them, as a distributor, a product that had something wrong with it.

Now, do you mean to say that you continued to sell this same product for the rest—for all of the years, 1943, 1944 and 1945, after you knew, within one month after you entered into your contract, that you had a bum product?

The Witness: Oh, I don't intend to say that at all, because we stopped buying from The Vita-Food Corporation in November, 1928, when we had the cancellation agreement.

The Court: Not 1928?

The Witness: I mean 1942, November 28, 1942. We stopped buying from The Vita-Food Corporation. [151]

The Court: I don't think so, not according to Exhibit 5.

(Testimony of Arthur Hanisch.)

The Witness: Well, those payments were made on products that we bought from another manufacturer, on the changed product.

The Court: That is interesting, then, because your exhibit says: "Schedule of Payments to Vita-Food Corporation, under Agreement of November 28, 1942."

Mr. Mackay: That is a settlement agreement.

The Court: Is that your settlement agreement?

Mr. Mackay: Yes.

The Court: Mr. Maiden, what is your question? You asked why they kept on selling the product of The Vita-Food Corporation. Was it your understanding——

Mr. Maiden: If the Court please, I have a very definite understanding that The Stuart Company continued to sell this product.

The Court: For how long?

Mr. Maiden: Up until the agreement of November 28, 1942, and that after that time they sold some of the concentrate, which they had purchased from The Vita-Food Corporation, but which had not been delivered to The Stuart Company at the time of the execution of that contract on November 28, 1942.

The Court: Then why don't you ask the witness to testify about the facts, so that if your own understanding is [152] not correct, you can straighten out your own understanding.

Mr. Maiden: That is exactly what I was undertaking to do, your Honor.

(Testimony of Arthur Hanisch.)

The Court: Please reframe your question. Your question wasn't clear to me, and I don't think it was clear to the witness.

Q. (By Mr. Maiden): I believe you stated that within a month or so, a short period after you commenced operating, that the bottles began exploding?

A. That is correct.

Q. Now, that would be in the spring of 1941?

A. That is correct.

The Court: What month?

The Witness: June or July. I wouldn't know definitely.

Q. (By Mr. Maiden): 1941. Now, then, did you continue to sell that product to the public up until the time you entered this agreement of November 28, 1942?

A. Yes, with changes being made as a result of my complaints to Mr. Lewis about this factor.

Q. Now, what changes were being made?

The Court: What date in 1942?

Mr. Maiden: It would be the date of that agreement, [153] November 28, 1942. I believe that is Petitioner's Exhibit 12.

The Court: Well, that is a period of 12, 15 months, then. I will ask you my question again, Mr. Hanisch: Why did you continue to sell a poor product for a period of 15 months?

The Witness: In the first place, I had a considerable investment in a business. That, of course, doesn't justify selling a bad product. You can't

(Testimony of Arthur Hanisch.)

condemn a product because of one mistake. It might have been one bad batch. I was assured by Mr. Lewis, and also Dr. Borsook, that trouble could be cured and remedied, and they told me very technical things they were doing, which would change the situation, and I believed them. However, the thing that stopped the——

The Court: Well, then, you mean that you continued to have this trouble during this period from June, 1941, up to the fall of 1942?

The Witness: That is correct.

The Court: During that period there wasn't any change made in the base of the product by The Vita-Food Company?

The Witness: I couldn't tell you that. As far as I know, I don't believe there was. The palliative I talked about——

The Court: That has been mentioned before and so you are talking about something that let the bottle run over when it fermented.

The Witness: Venting the cap. [154]

The Court: All right. Does that answer your question?

Mr. Maiden: Yes, your Honor.

Q. (By Mr. Maiden): Mr. Hanisch, I will ask you if it isn't a fact that over this period, from the time of commencing the active selling of this product, up until the cancellation of the contract on November 28, 1942, your sales were not increasing? A. I say they were not.

Q. I asked you if they were not increasing?

(Testimony of Arthur Hanisch.)

A. They were for a reason. That was the fact that we were offering greater vitamin values for the money, but we were also on a terrific upsurge of a wave of vitamin buying.

Q. Mr. Hanisch, I believe you stated that in these consultations with Dr. Borsook, that it was agreed that his primary interest was in putting out for the consumption of the greatest number of people at the least cost, a fine vitamin concentrate.

A. Exactly.

Q. And that he and Mr. Lewis were interested in a man who was willing to do that, rather than a man who simply wanted to go into it from the profit angle, is that correct?

A. No. That is not correct. We decided that we didn't want to take an exorbitant profit; that we would both be willing to take a reasonable profit, and I went further than that [155] and I said, "I would give part of my profits to remain in what they were trying at the California Institute of Technology."

Q. Well, did Dr. Borsook tell you that this vitamin concentrate that was being made by The Vita-Foods was equal or superior in quality to any other vitamin concentrate of the same character not being offered on the market?

A. I was told that it was a product superior to the best selling product that I knew of at that time on the Coast, in that it was a natural product which was the buying merit in Galen B. In addition to the B complex factors that Galen B had

(Testimony of Arthur Hanisch.)

in their product, we also had vitamins A, B and D, which was an added selling angle.

Q. And Dr. Borsook told you that?

A. Yes.

Q. Now, is it a fact that The Stuart Company never did meet their minimum quota under the contract, up until the time of the agreement of November 28, 1942? A. That is true.

Q. Now, Mr. Hanisch, what effort, if any, did you make to promote the sale of this product on a national basis?

A. Having men, hiring of men, who would call on doctors, the getting out of literature to doctors, a very unique procedure which had never been done before, as far as we could find out, in that at the inception of the program, we sent a full size bottle that retailed for \$1.95, by Western [156] Union messenger to the doctors in Southern California. We repeated that operation in San Francisco, repeated it in the Northwest and repeated it in Chicago.

Q. Now, that was at the inception, when you first started? A. That is correct.

Q. Did you continue that promotion?

A. We did at equal or greater intensity.

Q. I am just wondering how much you actually put into this corporation, The Stuart Company, when it started off; working capital. How much working capital did you give the corporation?

A. It would be difficult for me to recall the exact figures. However, I do know that I paid

(Testimony of Arthur Hanisch.)

Mr. Lewis in advance on those first two shipments, which you referred to before, in February and March. The item was \$3,000.00 on each occasion, which would be \$6,000.00. That is 48,000 pints. I would assume that I paid well over 30 or 40 thousand dollars, which the company later paid me, and I took a note for that payment. I can answer it a little bit further. At the time of the cancellation of the agreement, I do know that I had notes payable from the company to the extent of \$70,000.00.

Q. Now, do I understand you to state directly or inferentially, that the product was receiving a bad name?

A. Yes, and the way we were finding that out was: Our [157] men would go in to call on doctors, that is the men we call detail men, and one of the things we had instituted was a matter of those men getting together, and when they did get together they would write in the complaints the doctors gave them, and the complaints we had from them were two, primarily. One, the digestion factor, and the other one, the fact that people could not continue to take a cloying, a sweet cloying product.

In other words, the doctors were satisfied that we had a good thing at a good price, but they would not prescribe it to a patient who could not continue to take it.

Q. Now, was that condition getting progressively worse during 1941?

A. We brought it to Mr. Lewis' attention and he assured us he was working on it to make a

(Testimony of Arthur Hanisch.)

change in the taste factor. He actually submitted to us different tasting things, which we said were just as bad as the original. So, we never did get a product that we felt was satisfactory, although we repeatedly called it to his attention.

Q. Mr. Hanisch, who suggested the idea of this promotion, that is the type of promotion work that you would carry on in advertising this product for sale?

A. Primarily William Pringle, who was at that time an executive of Lord & Thomas and is now executive vice-president in charge of Foote Cone & Belding operations here. They are [158] successors to Lord & Thomas.

Q. You said "primarily." Would that indicate that someone else had something to do with this idea?

A. Someone else had to have something to do with it, because if you will look at the contract carefully, you will find there is a clause in there, that our advertising material had to be approved, and the thought behind that was: They didn't want us to make a statement that wasn't consistent with what they knew this product was.

Q. So, now coming back, I want to know: Is it a fact that Mr. Lewis and The Vita-Food Corporation participated and contributed to the promotion campaign that was put on by you for the public?

A. Not in one respect. The only thing they did—we had to submit it to them and have their O.K., because of that clause in the contract.

(Testimony of Arthur Hanisch.)

Q. Mr. Hanisch, you lived in California prior to 1932, is that right?

A. I have been here on visits before, but not permanently.

Q. Where was your home before you came to California?

A. Waupun, Wisconsin. It is a small town.

Q. In your eastern business, where were you located?

A. I lived in Waupun, originally had my factory there. We subsequently—as it expanded and the labor market there [159] wasn't buying enough, we took over a plant in Fond du Lac, which was 18 miles from there. Subsequently, I worked on a merger and that eventually grew into a plant in Eufaula, Alabama, and Little Town, Pennsylvania, and Reading, Pennsylvania. Then we had a selling organization for those manufacturing plants, which was located in New York City.

Q. What was the nature of this eastern business; that is, what was the product that you manufactured or sold? A. Children's hosiery.

Q. Children's hosiery?

A. That is right. Anklets and bobby socks.

Q. Was that hosiery sold under any particular name? A. No name of ours whatsoever.

Q. Well, was it sold under any name?

A. Some of it was; some of it was not. For instance, if we sold the S. H. Press Company, they might or might not have us put their name on. If we sold Marshall Field, they might or might not

(Testimony of Arthur Hanisch.)

have us put their name on it. We, however, never put our name on the product.

Q. Now, Mr. Hanisch, you say, then, that during 1941 and 1942, up until the time you entered this agreement of November 28, 1942, that the name, The Stuart Formula, had come into some ill repute?

A. Yes, I don't believe it is fair to say that The Stuart Company, as a company, did, because the doctors, I [160] think, liked our presentation of greater value. Whenever we did have a complaint, we did everything possible to keep the good will of that doctor and straighten out whatever harm might have been done in the situation, to the point where we bought merchandise from druggists which had been spoiled by these explosions.

Q. Were you experiencing difficulty in selling this concentrate from the very beginning?

A. Yes, because of the nature of an ethical operation in anything but an easy one.

Q. Well, did it become easier to sell the product, as you progressed from your commencing date?

A. Compared to the amount of money and the promotional effort we were putting into it, it was becoming more difficult, because a business of bad repute in the pharmaceutical field has a tendency to snowball and kick back on you as a snowball.

Q. And that bad repute had been established prior to the beginning of 1942?

A. Yes. You asked why the sales increased in spite of that. I can explain that very readily, be-

(Testimony of Arthur Hanisch.)

cause it came with opening new territories. Original sales were in Los Angeles. They then expanded to San Francisco and then—then we went to Chicago. That will account for the increase in sales.

Q. Now, notwithstanding all this difficulty you were having with the product, which you say had come into ill repute, [161] you still make no effort to cancel this product and break off business relations with The Vita-Food Corporation?

A. No, I was very patient. I brought the matter to their attention, with the hope they could be worked out in an amicable way.

Q. Did you find them to be agreeable men to deal with?

A. I don't know whether I can answer that. I mean, there were feelings in my mind that indicated that probably I had too much faith in people that I had trusted.

Q. Now, I believe you stated that the stock of The Stuart Company at the time of this contract—that this agreement was entered into on November 28, 1942, had no value? A. That is right.

Q. I believe you likewise stated that, in your opinion, this trade-mark, the name, The Stuart Formula, had no value at that time?

A. I qualified that statement, if you recall. We had debated at that time to continue functioning as The Stuart Company, bringing out an entirely different name from The Stuart Formula name. One we considered was "Stuart Vitamins." [162] In asking me whether I figured it had any value, I would have said it had the value that is tanta-

(Testimony of Arthur Hanisch.)

mount or comparable to what it would have cost us to make that change. I read the figures and our outside estimate on that was \$6,600.00, as I recall it.

Q. Now, just how much value did you place on the trade name, "the Stuart formula"?

A. None whatever, outside of what I just told you.

Q. Do you represent to the Court that you were not interested in obtaining the name, "the Stuart formula"?

A. We, in our contract, state for the "business' sake."

Q. I am not asking you about what you state in your contract, I am asking you to state to me now, whether or not you considered that the trade name, "the Stuart formula," had any value.

A. Are you talking prior to the contract, signing of the contract, at the time of signing or after the signing?

Q. I am talking about prior to and at the time, and after you signed the contract.

A. Prior to the signing of the contract, I had my whole plans made to get out an entirely new name. I placed no value on it whatever. However, I also came against a stone wall. I understood from this contract that I must buy my merchandise from Vita-Food, and I, therefore, could not go ahead with my plan to come out with any new name. [163]

Q. I am not talking about that. I am talking

(Testimony of Arthur Hanisch.)

about, at the time you acquired the title to "the Stuart formula" on November 28, 1942.

A. I placed no value on it whatever.

Mr. Mackay: If your Honor please, may I have the last question?

(The question was read.)

Mr. Mackay: If your Honor please, I object. There is nothing in the record to show that. The contract itself shows there was a quitclaim **without** warranty. I think the question is improper. It is not proper cross-examination.

Mr. Maiden: I think that is a weak objection, if the Court please, but I will put it this way—

Mr. Mackay: I don't want the record to show I am acquiescing to the trade name. Counsel here stated that at the time you acquired title—there is no evidence in the record to show that.

The Court: Objection sustained.

We will take a short recess at this time.

(Short recess taken.)

The Court: We will proceed. Will you reframe your question, Mr. Maiden?

Mr. Maiden: May I have the last question, please?

(The question was read.)

Mr. Maiden: I believe the Court sustained [164] the objection to that question. I am going to reframe it.

Q. (By Mr. Maiden): Now, were you inter-

(Testimony of Arthur Hanisch.)

ested at any time during 1941 or 1942 in acquiring part of, or the whole of whatever title Vita-Food Corporation had in, and to the trade name, "the Stuart formula"?

Mr. Mackay: May I have that question read, please?

(The question was read.)

Mr. Mackay: I think the evidence shows, your Honor, that there was no registration of the trade name until 1942.

Mr. Maiden: I am not talking about that, Mr. Mackay. I asked him if he was interested in acquiring whatever right or title Vita-Food might have had in and to this trade name.

The Court: You may answer.

Mr. Mackay: I think I will have no objection.

The Witness: I had discussions with Mr. Lewis on the matter of revising onerous conditions in the contract and at that time, in one or two of those discussions, he said, "I think probably we can work something out, which will give you title or part title to the trade-mark."

Q. (By Mr. Maiden): Then, your answer would be yes; is that right?

A. I had discussed it with him. [165]

Q. Well, I want to ask the question again. Were you actually interested in acquiring, either part or all of whatever title Vita-Food might have had in and to this trade name, at any time during 1941 and 1942?

(Testimony of Arthur Hanisch.)

A. As far as I can remember, I never made any proposition to him, in the nature of offering him anything for the acquisition of a trade-mark.

Q. I want to know whether or not you were interested in obtaining an interest in it?

A. In a vague way.

Q. What do you mean by "in a vague way"?

A. It didn't have any importance compared to the onerous part of the contract. Now, to me it was a very incidental interest, compared to the other situations that I wanted remedied.

Q. But you do admit an interest?

A. I admit a discussion with him.

Q. You admit an interest in a vague sort of way, is that right?

A. No, I would rephrase that. In an incidental way, very incidental to the important remedies I wanted.

Q. Now, Mr. Hanisch, how much money would you have given The Stuart Company in—we will say, in the summer of 1942, for whatever title it had in and to this trade name?

A. You mean what would I have given The Stuart Company? [166]

Q. Yes. I mean, what would you have given The Stuart Food Corporation? A. Nothing.

Q. You wouldn't have given them anything?

A. No.

Q. So that we have now definitely established it in this record, through your testimony, that you would not have given one plugged nickel for the acquisition of any part of whatever title Vita-Food

(Testimony of Arthur Hanisch.)

Corporation had in and to this trade name, The Stuart Formula; is that correct?

Mr. Mackay: Just a moment. May I have the question?

(The question was read.)

The Witness: I wouldn't have placed any value on it.

Q. (By Mr. Maiden): Now, did you feel, Mr. Hanisch, during and throughout 1941 and up until the time you entered into this agreement of November 28, 1942, that The Stuart Company was definitely losing ground and that you were faced with complete failure?

A. Yes, that it definitely was making no progress.

Q. Now, Mr. Hanisch, did you expect to start making money off of this product immediately upon opening business in the spring of 1941?

A. No. No business ever does that, that I know of. [167]

Q. Did you anticipate that there would be a development period necessary before you could show profits? A. Yes.

Q. How long a time did you estimate that it would take to establish this product on the market, in a profitable way, for The Stuart Company?

A. It is difficult to say, because it was a business of a type so different and new from anything that I was familiar with, that it is difficult for me to say what it would be. I went in there and did the best job I could.

(Testimony of Arthur Hanisch.)

Q. Would you say that you would have been surprised at a loss over the first year of the corporation operation? A. No.

Q. You would probably rather anticipate that, isn't that correct?

A. That is the nature of many businesses, that is right.

Q. Now, Mr. Hanisch, I believe the testimony shows that the Shaler Food Corporation was merged into The Stuart Company?

A. That is correct.

Q. On or about July 3, 1942?

A. That is correct.

Q. In other words, The Stuart Company took over all the assets and assumed all the liabilities of the Shaler Company? A. That is correct.

Q. The Shaler Company went out of [168] business? A. That is correct.

Q. Now, at that time was new stock issued by it, or additional stock issued by The Stuart Company?

A. At that time we voted, our Board of Directors voted, to issue stock. Now, the issue of stock actually didn't occur until some time later.

Q. I believe it probably is the substance of your testimony, that The Stuart Company never did get itself on a profitable basis, from the time of its organization up until you got out of this contract?

A. That is correct.

Q. According to your testimony——

A. Until we had a product that we had faith

(Testimony of Arthur Hanisch.)

in and that our customers had complete faith in.

Q. Up until the time of the agreement of November 28, 1942, you didn't consider your investment in The Stuart Company worth anything?

A. Worth very little, if anything.

Q. And you considered the prospects as practically nil, is that right, from a business standpoint?

A. Under this contract, I would have considered them practically worthless.

Q. Now, Mr. Hanisch, while we are on this point, I will ask you if it is not a fact that The Stuart Company applied to the Corporation Commissioner some time in the summer [169] of 1942, and I take it following the liquidation of the Shaler Company, for the right to issue additional stock?

Mr. Mackay: We will admit that.

Q. (By Mr. Maiden): And also for the right to issue some notes?

A. That is correct. I know an application was made; I don't know the details of that application.

Q. Who is Mr. Robert H. Dunlap?

A. He is our attorney, the company attorney, and at that time was an officer of the company.

Q. Do you know his signature?

Mr. Mackay: I will admit it.

Q. (By Mr. Maiden): Will you identify it?

A. That is Mr. Dunlap's signature.

Mr. Maiden: Now, if the Court please, we would like to read a statement from this letter of July 31, 1942, addressed to the Commissioner of Corporations—

(Testimony of Arthur Hanisch.)

Mr. Mackay: May I see the letter? Just a moment, are you going to offer it in evidence?

Mr. Maiden: Yes.

Mr. Mackay: I have no objection.

Mr. Maiden: If your Honor please, I would like to offer this letter into evidence, as Respondent's Exhibit C.

Mr. Mackay: No objection, your Honor. We will [170] admit it is the signature of Mr. Dunlap.

The Court: Received as Exhibit C.

(The document above referred to was received in evidence and marked Respondent's Exhibit No. C.)

Q. (By Mr. Maiden): I hand you here a letter dated August 1, 1942, which purports to be written by you, Mr. Hanisch, to the Corporation Commissioner. I will ask you if you will identify that?

A. That is my letter and my signature.

Mr. Mackay: We will admit it, your Honor.

Mr. Maiden: If the Court please, I put myself in a very embarrassing position here. Those original letters belong to the Corporation Commissioner's file, and I had them withdrawn for the purpose of making photostats. I would like to substitute a photostatic copy for the original letter that went into evidence, as Respondent's Exhibit C.

The Court: Any objection?

Mr. Mackay: No objection.

The Court: You may do that.

Mr. Maiden: I would like to offer in evidence

(Testimony of Arthur Hanisch.)

as Respondent's Exhibit D, the letter dated August 1, 1942, just identified by Mr. Hanisch as having been written to the Corporation Commissioner by him.

Mr. Mackay: There is no objection. [171]

The Court: Received as Exhibit D.

(The document above referred to was received in evidence and marked Respondent's Exhibit No. D.)

Q. (By Mr. Maiden): I will call your attention, Mr. Hanisch, to a paragraph in your letter of August 1, 1942, in which this statement appears: "Mr. Dunlap has informed me of his statement to you that the business of The Stuart Company is now on a profitable basis and has been for approximately sixty days last past. This is correct. He also informs me of your statement that your rules require that the new stock be escrowed unless a more favorable financial statement can be truthfully furnished."

Now, that was a misstatement of facts, Mr. Hanisch, when you stated that The Stuart Company was on a profitable basis at that time and had been for the past sixty days?

A. It was an inadvertent misstatement of facts on my part, occasioned by this: The man who was our certified public accountant, who was to establish these figures, was very late in getting to the job. He made a review of the figures, and assured me that those figures were correct and I, not being an accountant, must take the word of the man who

(Testimony of Arthur Hanisch.)

was that. I have subsequently found out that those two months that I said showed a profit, actually showed a loss, but it was a mistake, occasioned by an accounting—— [172]

Q. I believe this statement, which the letter shows was made by you to the Corporation Commissioner was in order to avoid the necessity of having to have this new stock put in escrow?

A. That is correct.

Q. I will ask you, was that stock issued by the Corporation Commissioner without being put under escrow? A. I believe that is correct.

Q. Now, Mr. Hanisch, I call your attention to a postscript on the letter, on the letter written by Mr. Dunlap to the Corporation Commissioner, as of July 31, 1941, which reads as follows: "The Stuart Company has been informed by wholesale drug dealers, that the product of that company has been a stand-out, and one large western distributor has informed the Applicant that its product is the fastest moving item, with one exception, Alka-Seltzer, that they have encountered in 15 years."

Would you say, or would you subscribe to that statement made by Mr. Dunlap?

A. I would have to give you a qualified answer, in this respect: That this happens to be an isolated jobber in the particular area, where Dr. Borsook and the California Institute of Technology have a good deal more prestige than any other place. Therefore, they did an outstanding sales job, which is not typical. [173]

(Testimony of Arthur Hanisch.)

Q. Who did an outstanding sales job?

A. This particular jobber we mention here, but it was not typical. Furthermore, that, to my mind, is no test or criterion of whether those sales had been done on a successful basis, because we did it on a matter of price and if you sell diamonds at \$10.00 a carat, you certainly can sell them, but that doesn't make your business a success.

Q. Now, Mr. Hanisch, coming back to the Petitioner's Exhibit 8, which is this contract of May 5, 1941, I believe you stated that this was the result of several conferences, and, at least, was the final of one previous draft anyway.

A. That is correct.

Q. I believe you stated that you read through this agreement and that, notwithstanding some advice by some business associate, that you were agreeable to entering into that contract.

Did you carefully consider each of the provisions in the contract, Mr. Hanisch?

A. I did, and I foresaw dangers that might occur if I were not dealing with completely reliable people.

Q. Now, I believe that paragraph two of this, that is numbered paragraph two, which appears on page 3, that this paragraph specifically provides that the trade-mark or label "the Stuart formula" was the property of Vita-Food Corporation. That is the meaning, in substance, of that paragraph. is that [174] correct? A. That is right.

Q. And you so understood that to be a fact at

(Testimony of Arthur Hanisch.)

the time, as between you and Vita-Food Corporation; you laid no claim or right to the ownership of that trade name at that time?

Mr. Mackay: If your Honor please, I object to that. I think counsel is arguing.

Mr. Maiden: Mr. Mackay, I was very kind to you. I didn't interrupt you.

Mr. Mackay: I am sorry I interrupted. May I have the last question, please?

(The question was read.)

The Witness: Will you repeat the question again, please?

(The question was reread.)

The Witness: I still don't get it. Will you read it again?

(The question was reread.)

The Witness: That is correct.

Q. (By Mr. Maiden): It was your understanding, then, that that trade name was to be and was at that time, the property of Vita-Food Corporation?

A. That is correct. [175]

Q. Now, Mr. Hanisch, you keep talking about onerous provisions of this contract, and I presume that you have certain provisions in there in mind. Did it occur to you at the time you entered into that contract, that any of the provisions would work a hardship on you?

A. Not on the ones that really worked the greatest hardship.

(Testimony of Arthur Hanisch.)

Q. Which ones were they?

A. The ones that specifically stated that I could not purchase vitamins from anybody but the Vita-Food Corporation, regardless of price, quality or anything else.

Q. Now, you understood that to mean that you couldn't do that so long as you were operating under that contract, isn't that right?

A. That is correct.

Q. Now, Mr. Hanisch, I don't believe—I may be wrong—but I don't believe that Mr. Mackay—he probably forgot it—brought out through your testimony anything about any notice of cancellation of this contract, having been issued to you in 1942.

A. He did not.

Q. By the Vita-Food Corporation?

A. He did not bring it out.

Mr. Mackay: I didn't forget it. I had another witness who is more familiar with it. [176]

Mr. Maiden: I see.

The Court: Was that a fact; were you given notice in 1942 that you had defaulted in the contract, that is, were you given a notice of termination?

The Witness: Yes, October, 1942.

Q. (By Mr. Maiden): Did you acknowledge receipt of that notice, under date of October 12, 1942, Mr. Hanisch?

A. Yes. I have a copy of the letter here, if I may read it, the acknowledgment——

Mr. Maiden: Well, I presume——

(Testimony of Arthur Hanisch.)

Mr. Mackay: Just wait. He is asking you if you received it.

The Witness: Yes, I received it.

Q. (By Mr. Maiden): Now, pursuant to a conversation which you had with Mr. Lewis, in the spring or summer of 1942, about acquiring an interest in the name, "the Stuart formula," did Mr. Lewis have drafted a new contract that would take place of the May 5, 1941, contract?

A. Yes, he submitted a proposed draft in August, 1942, which was completely unsatisfactory, because it did not remedy the important points that I objected to in this operating arrangement. It did mention trade-mark, but not the important things. I did not accept it. [177]

Q. You weren't interested in the trade-mark part of that agreement?

A. There was an arrangement there to give us an interest in it, but other features of the contract were so objectionable that we simply threw it back and said that we couldn't accept it.

Q. I will ask you if it isn't a fact that the re-writing of the May 5, 1941, contract wasn't prompted by your statement to Mr. Lewis, that you would not go on with the promotion of this vitamin concentrate unless and until—that is on a national basis—unless and until you received a half interest in the title to the trade name or trade-mark "the Stuart Formula"?

A. That was the thing that came up in the dis-

(Testimony of Arthur Hanisch.)

cussion, but the onerous factors of this contract were the things I objected to. I could not operate under this contract, whether I had the trade-mark or not.

Q. Now, Mr. Hanisch, I will ask you if you didn't refuse to accept the rewriting of that May 5, 1941, contract for the sole reason that under the proposed redraft of the contract, in that part of the provisions whereby the Vita-Food Corporation was to give you a half interest in the trade-name "the Stuart formula," the provisions further provided that unless you maintained the specified quota of purchases set out in the proposed redraft, your one-half of this trade-mark [178] would revert in the Vita-Food Corporation?

A. I do not recall that that was the reason. I discussed it with my attorney and we had 15 or 20 points of variance on this thing, in which we did not get the remedy we wanted. We simply turned the whole thing down.

Q. Now, I believe you stated that you didn't have any reliance at any time upon the financial stability of the Vita-Food Corporation?

A. I don't believe that is a completely correct statement. I think up to the time that I first was told that account should be guaranteed, I did have faith that they had the financial ability to carry out the commitments they went into under this contract.

Q. Now, while we are right there on that point, I believe you said something about guaranteeing

(Testimony of Arthur Hanisch.)

the credit or the financial responsibility of Vita-Food Corporation.

A. That is correct, to one supplier of the bottles, only.

Q. Did you put that in writing or anything?

A. I did not.

Q. How much did the credit amount to?

A. I wouldn't know, because I wouldn't know what they were paying for the bottles. He simply said he would not supply them unless I would give that guarantee verbally to him.

Q. You didn't underwrite any credit of Vita-Food Corporation to anybody else? [179]

A. No.

Q. Or at any other time?

A. As far as I remember, no.

Q. Now, did Vita-Food Corporation, ever, at any time, that is, prior to the agreement of November 28, 1942, find itself in a position of not being able to deliver to you when ordered by you at the time specified for delivery by you, the vitamin concentrates?

A. Oh, there might have been a delay of a few days, but never to the point where it embarrassed us.

Q. Now, you have already testified that you never did fill your quota? A. That is correct.

Q. I will ask you whether or not the Vita-Food Corporation, through Mr. Lewis, was at all times urging you to push your promotion of sales, in order for you to be able to meet the minimum requirements?

(Testimony of Arthur Hanisch.)

A. Oh, yes. He was very eager to have us do that. As a matter of fact, he would have had us go into territories twice as big as we had in the country, but I was loathe to do that with an unsatisfactory product.

Q. In other words, at all times, you admit, that Vita-Food Corporation was willing and able to furnish you all of the vitamin concentrates that was required by your business?

A. I have no way of knowing that, because I never saw [180] the plant. I wouldn't know the capacity of the plant. I don't know what they could produce.

Q. All you know, you never placed an order with them that wasn't fulfilled? A. That is correct.

Q. Now, Mr. Hanisch, I believe you stated that one thing about the financial stability of the Vita-Food Corporation that had you worried, was in connection with the explosion of these bottles; that you didn't want to have to assume the financial responsibility in connection with exploding bottles and returned merchandise, is that right?

A. That is correct.

Q. That was one feature of the contract that you didn't like, is that right?

A. That was one feature that had me worried, because I felt that if at some time we had a terrifically large return and the company, Vita-Food Corporation, were not capable—if they were not in

(Testimony of Arthur Hanisch.)

a good financial position, I had no recourse. That is why it was an important issue to me.

Q. Now, I am going to ask you to look at the contract of May 5, 1941, and see if you don't find in there, a specific provision that the Vita-Food Corporation would carry insurance with respect to those products, and covering the very thing about which you have just now testified?

A. I know the situation you refer to, and that was [181] known——

The Court: Will you look at the contract?

The Witness: What paragraph is that?

Q. (By Mr. Maiden): It is toward the end, about the third page from the end, sir.

A. Yes, it is on page 10, paragraph 18, if that is the one you mean.

Q. That reads: "It is understood that second party now has a policy of product liability insurance, a copy of which has been delivered to first and third parties——" and that would be you and the corporation?

A. That is correct.

Q. (Reading further): "——the receipt whereof if hereby acknowledged and that the form and amount of such policy is satisfactory to first and third parties; and first and third parties agree to pay to second party on demand such additional premiums as are or may be charged under said policy for coverage of first and third parties."

A. You are asking this question in connection with the previous question?

(Testimony of Arthur Hanisch.)

Q. Yes.

A. I think you have a misconception of what product liability insurance is. Product liability insurance means this: That, if you or your child would swallow some of this [182] stuff and you are injured, you have insurance on that, but it does not provide for bad merchandise. Say, if \$20,000.00 of it blew up, or I had to return it, it does not insure against a return of merchandise. It does give you protection. We had one attempted case where a mother claimed a child swallowed some glass. That is what this covers. It would not cover what you are talking about.

Q. I am glad you pointed that out, because that had puzzled me.

A. We carried that policy——

Q. Isn't it a fact that the Vita-Food Corporation—strike that. Isn't it a fact that all of the damage that you suffered by reason of bottles exploding and labels being damaged, and any damage that might have been done in the inside of a drug store or wherever the product might have been, that the Vita-Food Corporation took personal responsibility and assured liability of all of that; and I will ask you, if, as a matter of fact, they didn't in each and every case, make full and complete restitution?

A. That is correct. You said for all damages. Now, I can think of damage being done to us, due to the fact that a doctor prescribed a product, which gave that patient indigestion. There is an intangible

(Testimony of Arthur Hanisch.)

type of damage that he could not possibly cover. It is a damage to our prestige.

Q. You knew, Mr. Hanisch—or at least it was being [183] represented to you, that the Vita-Food Corporation was working all of the time, trying to improve this particular product that it was selling to you?

A. That is correct. That is the reason I had such patience.

Q. Did you understand that Dr. Borsook was assisting in the efforts being made to cut out these so-called defects?

A. That is right. I understood he was interested in trying to iron out these problems.

Q. Now, weren't they making progress?

A. As far as we could find out, no.

Q. You say that up until the time of this instrument of November 28, 1941, that——

A. 1942.

Q. 1942—that they had not made these corrections in the product and had not perfected the malt base?

A. No, we never had a product from them with a malt base. They might have had it, but we never did.

Q. I will ask you if it is not a fact that under this contract of May 5, 1941, the Vita-Food Corporation wasn't bound to sell through you all of their products?

A. That is not true. There was a qualification——

(Testimony of Arthur Hanisch.)

there were two qualifications, as I recall it. They were bound to us to sell the products recited here in the contract, but they had a provision on a product which they had already had on [184] the market, prior to the inception of the Stuart, called "Vitall."

The provision in the contract reads this: That we were allowed to sell Vitall outside of Los Angeles County, they reserved the right to sell it in Los Angeles. When and if the total sales we made for the Vita-Food Corporation reached \$2,000.00 a day, then, we were to make a deal to get the Vitall. There was another exception. They could develop new products. They would offer new, original products to us and, unless we agreed to market them within ten days after offering, they could offer it to somebody else. They also reserved the right to sell to certain government agencies.

Q. I think the contract will speak for itself.

A. I thought you asked me.

Mr. Maiden: I didn't mean to take up that time, your Honor.

The Witness: I am sorry.

Q. (By Mr. Maiden): Now, Mr. Hanisch, I believe the penalty under this contract of May 5, 1941, for your failure to meet the quota as required was simply the cancelling of that contract by Vita-Food Corporation?

A. That is the way I would read the contract. The complete cancellation of the contract.

Q. Now, I am interested to know why it is that,

(Testimony of Arthur Hanisch.)

if that [185] was the fact and that if you were so dissatisfied with this product, why you didn't cut down on your purchases of the concentrate from the Vita-Food Corporation to the extent that the Vita-Food Corporation would cancel that contract on you?

A. We didn't do it. We did our best to live up to the essence of that agreement.

Q. Notwithstanding the fact that you were dissatisfied with it and felt like it wasn't worth anything?

A. There was nothing—it served no purpose to us to get a cancellation of that contract because I had become by that time interested in the potentialities possible in the pharmaceutical field, with the proper products. However, under that contract, I could not be in this business without buying from them, regardless of what we were letting—

Q. Well, Mr. Hanisch, you say you were not interested in a cancellation then?

The Court: Now, Mr. Maiden, I want to have this answer read back, because part of the question will involve this contract and the parties to this proceeding are going to ask the Court to make an interpretation of this contract. The contract is going to have to speak for itself, to a very large extent.

Now, paragraph 7 provides—this is Exhibit 8, “First parties shall handle no other products than those manufactured or produced by second party, and shall be the sole [186] distributors of all prod-

(Testimony of Arthur Hanisch.)

ucts manufactured or produced by second party, except as herein otherwise provided.”

Now, I will call counsel’s attention to that clause, and I ask counsel to consider again the witness’ answer and decide whether you want to ask the witness another question. Read the answer.

(The answer was read.)

Mr. Maiden: I think I understand what the Court has in mind. I believe I previously elicited the answer from Mr. Hanisch.

The Court: All right. Now, Mr. Hanisch as long as this contract stayed in existence, you were bound by the terms of it?

The Witness: That is right.

The Court: Didn’t you understand that as long as this contract was in existence, you were restricted to sell only the products of Vita-Food?

The Witness: That is correct.

The Court: Now, did any lawyer ever tell you or did you ever have any understanding, that this contract meant that you could never sell any pharmaceutical products in the United States for the rest of your business life, whether or not this contract was cancelled?

The Witness: I was told—the contract——

The Court: Just pay attention. As long as [187] this agreement stayed in existence, you were bound by the terms of it; isn’t that correct?

The Witness: Yes.

(Testimony of Arthur Hanisch.)

The Court: When the agreement was cancelled, whatever circumstances it would be cancelled for, you would be free from the contract. Now, you would be free from all the provisions of the contract, isn't that true?

The Witness: That is what we preferred.

The Court: No. Mr. Mackay, your witness has argued with everyone all day long.

Mr. Mackay: Please answer the question.

The Court: Please instruct your witness that it is a rule of procedure in all the courts that the witness answers the questions, and they do not argue with counsel or the Court. Now, Mr. Hanisch has been debating his case all day long with counsel, instead of answering questions. The Court is trying to get the facts.

The Witness: I am sorry.

The Court: Your lawyer will argue his case in his brief. Instruct the witness.

Mr. Mackay: Please listen to the Court and just answer the questions without any argument.

The Witness: Yes.

The Court: Was it your understanding that when this contract ended, for whatever cause it ended, you were released [188] from every covenant you ever made in the contract?

The Witness: That is right.

The Court: Therefore, if the Vita-Food people terminated the contract because you didn't live up to your agreement to sell a large enough quota, then

(Testimony of Arthur Hanisch.)

you would be free to go out and sell other products?

The Witness: That is correct.

The Court: And counsel just asked you why you weren't perfectly willing then to have Vita-Food terminate the agreement on you. Now, why weren't you?

The Witness: Because the contract was not cancelled in total. It was cancelled according to one provision. However, in their letter——

The Court: That wasn't counsel's question. You see, you argue.

The Witness: Will you rephrase the question?

The Court: If you really will listen to the question, I think perhaps you would answer, but I don't think you want to listen to them, do you? The question is, why were you unwilling then to let Vita-Food serve on you a termination of the contract? The question has nothing to do with any eventual termination. Mr. Maiden was asking you a question, in the nature of a hypothetical question, and his question was: Why, if you were dissatisfied, didn't you use the contract itself for Vita-Food—for letting Vita-Food terminate the [189] contract, let the contract operate in its terminating features, let them cancel the contract. Now, "cancel the contract" means "cancel the contract." It means cancelling all of the contract. Now, I wonder if you really would try to answer that question and not argue about it. Of course, you can always say that you do not care to answer the question or that you cannot

(Testimony of Arthur Hanisch.)

answer the question, but the question is a perfectly simple question.

The Witness: I understand it now, the way you phrased it, and I would answer that by saying, I would have liked to have that contract cancelled in its entirety.

Mr. Mackay: May I make a suggestion? Of course, the witness has been on the stand for a long time. He has been on the stand from 10:00 this morning until a quarter of six.

The Court: You think that we should recess, Mr. Mackay? The reporter will mark the last question and the last answer and I would like, for the purpose of the record, Mr. Mackay, to say that the reason I have asked the witness these questions and pointed out that he tends to be argumentative, is this: When the record has to be read by the Court and by counsel, and I have had to say this before during the day, these argumentative answers spoil the record, because we do not have any decisive answers and we might just as well not have a trial if, at the end of the trial, both parties are not going to be [190] in a position to argue about what is in the record.

I want to point out to this witness himself, that one of his answers did not conform with one of the requirements of the contract, and that one of his answers was absolutely wrong; that any intelligent business man would know that when a contract ter-

(Testimony of Arthur Hanisch.)

minated, he could go out and sell Bromo-Seltzer or any other product he could get the agency to sell.

Mr. Mackay: Yes, your Honor.

The Court: We will adjourn until 2:30 p.m. tomorrow.

(Whereupon, at 6:00 o'clock p.m., an adjournment was taken until 2:30 o'clock p.m., Thursday, January 29, 1948.) [191]

January 29, 1948

The Court: Proceed.

Whereupon,

ARTHUR HANISCH

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: Will you read the last question, please?

(The record was read.)

The Court: I think you had better start in again if you want to pursue that. Ask the question over again.

Cross-Examination

(Continued)

By Mr. Maiden:

Q. Mr. Hanisch, first I want to ask you to identify a letter from The Stuart Company, dated October 12, 1942, to The Vita-Food Corporation.

(Testimony of Arthur Hanisch.)

A. Yes, that is my signature and a letter from The Stuart Company.

Mr. Maiden: If the Court please, I would like to offer this in evidence as Respondent's exhibit next in order.

The Court: Exhibit E.

(The document above referred to was received in evidence and marked Respondent's Exhibit E.)

The Court: What is Exhibit E?

Mr. Maiden: If the Court please, Exhibit E is a [193] letter from The Stuart Company to The Vita-Food Corporation which acknowledges the receipt by The Stuart Company of The Vita-Food Corporation's service of notice of cancellation of the contract; that is, the contract of May 5, 1941.

The Court: What is the date of the letter?

Mr. Maiden: Date of the letter is October 12, 1942.

The Court: Received as Exhibit E.

Q. (By Mr. Maiden): I will ask you if you will identify for the Court, Mr. Hanisch, this document which is entitled "Notice of Rescission."

A. May I read it?

Q. Yes. A. Yes, this is my signature.

Mr. Maiden: I would like to offer this in evidence, if the Court please, Respondent's Exhibit F.

Mr. Mackay: I have no objection. Do you have an extra copy of this—oh, we have a copy.

(Testimony of Arthur Hanisch.)

The Court: Received as Exhibit F.

(The document above referred to was received in evidence and marked Respondent's Exhibit F.)

Mr. Maiden: I might state for the benefit of the Court that this Exhibit F, Respondent's Exhibit F, designated "Notice of Rescission," is addressed to The Vita-Food Corporation and M. H. Lewis, and it is signed The Stuart Company, [194] by Arthur Hanisch, its agent, and Arthur Hanisch by Arthur Hanisch. The import of the exhibit is that The Stuart Company and Arthur Hanisch "hereby rescind that certain agreement dated May 5, 1941, by and between Vita-Food Corporation, Shaler Food Products Company, The Stuart Company and Arthur Hanisch; and the said Arthur Hanisch does hereby rescind the transfer of 15 per cent of The Shaler Food Products Company stock and 15 per cent of the capital stock of The Stuart Company to M. H. Lewis.

"That said rescission is based upon the following grounds: 1. Fraud in the inception of said contract; 2, failure of consideration in its performance; 3, mutual mistake."

Q. (By Mr. Maiden): Mr. Hanisch, it is a fact, then, that as of October 8th and October 12th—that is, by October 12, 1942, the contract of May 5, 1941, was in the process of termination under and within the terms of the contract?

(Testimony of Arthur Hanisch.)

A. I do not believe that to be completely correct, in that only one paragraph was cancelled. That is, I think it is paragraph 7, which refers to our exclusive selling rights. In our reply, we did not recognize Vita-Food's right to use the intermediary step, that is, cancel the contract in part.

Q. The substance, then, of your letter of October 12, 1942, was that you would try to make up the deficiency in your quota? [195]

A. That is correct.

Q. But that you had doubts of your ability to make up the deficiency? A. That is correct.

Q. And that you took the position that the contract was cancelled as of the date of your letter for all purposes?

A. That is correct, if it could be cancelled. We maintained that they could not cancel one part of the contract.

Q. In other words, it was your position that at 60 days from and after October 12, 1942, the contract should and would be cancelled for all purposes? That was the position you took?

A. Yes.

Q. Now, Mr. Hanisch, at any time after the notice that you gave Vita-Food Corporation, as of October 12, 1942, which is Respondent's Exhibit E, did The Vita-Food Corporation or any representative of The Vita-Food Corporation advise you or The Stuart Company or any official of The Stuart Company that the Vita-Food Corporation did not

(Testimony of Arthur Hanisch.)

accept and would not accept your cancellation notice of October 12, 1942?

A. I do not recall, because in those negotiations and meetings they were held between the two attorneys and I was only at the two final meetings.

Q. So, as far as you know, then, personally, The Vita-Food Corporation did not take the position that your notice of [196] October 12, 1942, was not a good notice?

A. To my personal knowledge, no.

Mr. Mackay: If your Honor please, counsel has called my attention to a complaint which was filed in the Superior Court of the State of California, in and for the County of Los Angeles, between The Vita-Food Corporation, a corporation plaintiff, versus Arthur O. Hanisch, The Stuart Company, a corporation; Donald B. Hops and others, which complaint bears the number 482045, which was filed—there is the filing date of November 25, 1942. I have a copy of the complaint and the exhibit attached to the complaint, photostatic copy, which I intended offering by another witness, as our exhibit. I now offer it in evidence, if your Honor please.

Mr. Maiden: And it is in evidence as proof of all of its contents? That is, I don't understand that you would agree that the allegations set forth in the petition are true?

Mr. Mackay: Oh, indeed not. We don't agree they are true. All we are putting in this exhibit for is to show that the complaint was filed and what

(Testimony of Arthur Hanisch.)

is alleged therein. All the allegations are contrary to the evidence we have put in and which we shall put in later.

The Court: Received as Exhibit 15.

Mr. Mackay: That is a certified copy.

(The document above referred to was received in evidence as Petitioner's Exhibit No. 15.) [197]

Q. (By Mr. Maiden): Now, Mr. Hanisch, I believe on your examination yesterday, either on direct or cross, probably on cross, you stated that prior to the execution of the instrument dated November 28, 1942, that no dispute had arisen between The Stuart Company and The Vita-Food Corporation, with respect to the ownership of the trade name or mark, "the Stuart formula"; is that correct?

A. That is correct, with a qualification. I must qualify that, in that after sometime in September, I did not meet any member of The Vita-Food Corporation until I talked to Mr. Wiseman in our settlement arrangement.

Q. Now, Mr. Hanisch, I would be interested in you explaining to the Court when it was that you conceived the idea of laying a claim to ownership of the trade name or mark, "the Stuart formula"?

A. It occurred as soon as I was completely aware of my position, due to the disillusionment I had as a result of faulty merchandise, a price structure which was unrealistic and complete realization that I was in hoaxed position. At that time I made it my busi-

(Testimony of Arthur Hanisch.)

ness to find out what my rights were, under this situation, and through my counsel I proceeded to find out what my rights were under the trade-mark situation. We immediately consulted our trade-mark attorney, who was recommended by Mr. Dunlap, my counsel. [198]

Q. Why were you interested in this trade-mark or name, "the Stuart formula" at that time?

A. Because we wanted to know what our rights were under this thing in every respect, and that was one incident in determining what our rights were.

The Court: Would you ask the witness when he first became interested in making this claim? He said why, but he didn't tell you when.

Mr. Maiden: Thank you, your Honor.

Q. (By Mr. Maiden): Will you tell me when you first became interested in making a claim?

A. I am sorry, but I can't give the exact date. It was sometime subsequent to the middle of September.

Q. Now, why did you become interested?

A. It was one of the incidents of finding out what my rights were in a potential dispute.

Q. Well, will you just explain that—how the question of your claiming ownership of "the Stuart formula" had anything to do with determining your rights under the contract?

A. We realized there was a potential litigation on the whole contract and the trade-mark thing was one paragraph in the contract. Therefore, it had to

(Testimony of Arthur Hanisch.)

be considered just as every other paragraph in that contract was, and had to be considered. [199]

Q. But you weren't interested in obtaining—did I understand from your conversation yesterday that you weren't interested in obtaining the title to the trade-mark?

A. That wasn't the point at issue. We were examining that contract. We realized there was a potential lawsuit predicated on cancellation of that contract, or a dispute over the contract. That being one part of the contract, we considered it just as we considered every other clause of that contract.

Q. That potential litigation was in the offing?

A. We knew there was a dispute. We had a notice of cancellation of the contract in part. That is the one paragraph—Paragraph 7. We did not agree with that position, however, and naturally we assumed there would be a dispute in the matter.

Q. Did you make any effort to determine from Vita-Food Corporation whether they intended to try to hold you to all of the contract, with the exception of one particular part?

A. I cannot answer that because, as I stated before, all of the discussions on those legal points were between their counsel and our counsel.

Q. Now, what was your chief interest at that time?

A. My chief interest was to get out of it—get a cancellation, get out of an onerous contract under which I could not operate.

(Testimony of Arthur Hanisch.)

Q. That was all you were concerned with? [200]

A. That was absolutely all I was concerned with.

Q. Will you tell me why it was that you were concerned with the title to this trade-mark?

A. I was not concerned with the title—of acquiring the title. I was concerned in finding out what that thing meant in the contract and what we had to do about it, as we had to consider every other part of that contract.

Q. If all you were interested in was a cancellation of this contract, why would you yourself be interested in determining whether or not you could establish ownership of the trade-name, “the Stuart formula”?

A. That is the thing that was revealed to us when we made examination of what the trade-mark part of the contract meant. We went to a trade-mark lawyer to find out what the implication of that paragraph was and then he came out and volunteered the information that the ownership did not vest in Vita-Food at all and it was their revelation to us. We didn’t ask for it.

Q. You mean, in other words, you and your associates in The Stuart Company didn’t understand that part of the provision in the contract of May 5, 1941, dealing with the question of the ownership of the trade-mark, “the Stuart formula”?

A. My attorney advised us to get expert opinion on that phase of it.

Q. Well, I don’t care about what your attorney

(Testimony of Arthur Hanisch.)

advised [201] you to do. I want to know what was there about that provision in this contract of May 5, 1941, respecting ownership of this trade-mark that you didn't understand.

A. It was purely a matter—let me read it.

Q. It is Paragraph 2.

A. There was another point that I recall. We did not know whether there had been actual issuance of the trade-mark. If it actually hadn't been issued, that would probably have to be considered in this cancellation situation and our trade-mark attorney was instructed to find out what the nature of the trade-mark was. That is when we were informed that the trade-mark was not the property of Vita-Food Corporation, but we did not go there for the purpose of acquiring the trade-mark.

Q. What difference did it make to you, Mr. Hanisch, or to The Stuart Company whether The Vita-Food Corporation had registered this trade name?

A. My attorney informed me that it was important in planning the suit that we were planning to bring against them.

Q. But, Mr. Hanisch, you have stated that in the very beginning you recognized that this trade-mark should be the property of Vita-Food Corporation.

A. That was—you say, in the beginning? What are you referring to?

Q. Well, in Paragraph 3. I mean in Paragraph

(Testimony of Arthur Hanisch.)

2 of the [202] contract of May 5, 1941, it is stated——

A. You mean that is the beginning? This contract——

Q. Yes.

A. That I recognized the ownership?

Q. Yes. A. Yes, I did.

Q. And you signed this contract, didn't you?

A. I did.

Q. Recognizing this ownership?

A. That is correct.

Q. You never questioned this ownership to The Vita-Food Corporation at any time prior to the date I have previously mentioned?

A. Not at that time, and I never was interested in any respect until I was disillusioned and found out there had been so many violations. Then I wanted to determine what my rights were under the contract.

Q. In other words, when—in the summer, the fall rather of 1942, when you became interested in this trade-mark question, it was your intention for your company to go into court, undertake to take away from The Vita-Food Corporation a property right which you had at all times recognized and had agreed that belonged to The Vita-Food Corporation?

A. That is not correct to say that that was our intention. We did not plan to do anything definitely on that [203] situation until I was served with a

(Testimony of Arthur Hanisch.)

summons on—I don't know the date. I think it was November 26th. Anyway, The Vita-Food attempted to get an injunction preventing us from marketing merchandise using that trade-mark. Shall I amplify that a little more?

Q. Why would that injunction suit, which I understand and which will show from the record was solely for the purpose of enjoining you from selling vitamin concentrates that had not been manufactured by Vita-Food Corporation under the trade name "the Stuart formula," cause you to contemplate bringing a suit against The Vita-Food Corporation having as its purpose the wresting from them a property right which you had agreed they had from the very beginning?

A. That was only part of our cross-complaint. We felt that we had been injured, in that they cancelled only one paragraph of that agreement. We, therefore, had to establish our rights completely under that agreement.

Q. Now, Mr. Hanisch, you say in your cross-complaint—did you ever file any cross-complaint?

A. No, we had it——

Q. In the injunction suit?

A. No, we had it in the course of preparation when Mr. Wiseman and Mr. Dunlap finally got together on their conference, which led to settlement.

Q. Then, I believe it is established here that until [204] this injunction, the notice of this injunc-

(Testimony of Arthur Hanisch.)

tion was served on you, you had no intention of filing a law suit, undertaking to take away from The Vita-Food Corporation the title to the trade-mark?

A. No, that is not completely correct, because Mr. Dunlap had prepared a suit in which the trade-mark matter was mentioned, and that was part of his plan in the suit.

Q. Well, do you know when Mr. Dunlap prepared that?

A. I couldn't tell the exact date. I know he worked on it, I think, in October and November. I couldn't tell you the exact dates.

Q. Did it occur to you, Mr. Hanisch, that after once recognizing the property right of Vita-Food Corporation in and to this trade-mark, as you specifically did in the contract of May 5, 1941, that you would be guilty of bad faith?

A. Shall I answer that?

Q. Yes.

A. No, I was not guilty of bad faith. May I amplify that?

Q. Yes.

A. This whole arrangement, as I explained in direct examination yesterday, was predicated on the business of good faith. When I found out that many things had been done which were not in keeping faith with this agreement and the agreement made with me, I started to find out what my rights were. [205]

(Testimony of Arthur Hanisch.)

Q. Suppose you and I enter into a business transaction, Mr. Hanisch, and suppose we set up the complete business arrangement that is to prevail between us, and suppose that an agreement involves a situation similar to what we have here and it is agreed that you are, that you own and are to own this particular piece of property that I claim no title to——

Mr. Mackay: If your Honor please, I object to that question as being argumentative; also compound; assuming facts not in the record. I don't like to limit counsel's cross-examination, but I think his examination ought to stay as nearly as possible to the facts in the record. This is all assumption; also compound and argumentative, and I think it is not proper cross-examination.

The Court: It is proper cross-examination. Your objection is overruled.

Mr. Maiden: Read the question, please.

(The question was read.)

Q. (By Mr. Maiden): ——and then a year or two later you and I have some disagreements as to the operation of this business. Would you consider it bad faith upon my part——

A. Under certain——

Q. Just a second. A. Excuse me.

Q. ——if simply because I didn't like the way the business [206] arrangement had worked out, I then asserted a claim to this piece of property and undertook to take it away from you?

(Testimony of Arthur Hanisch.)

A. Under certain circumstances, I could answer that yes. However, if misstatements, deliberate misstatements at the inception of this contract made me go into a thing which caused me damage, I think I am entitled to look out for my rights under that, and see if I can get out from under it on the basis of complete misrepresentation.

Q. But all you wanted to do here, you say, was to get out from under the contract.

A. Absolutely. I could not operate under this contract.

Q. Well, how did you calculate, then, that laying a claim to the trade-mark "the Stuart formula," if you weren't interested in that trade-mark, would help you get out of the contract?

A. That was part of the general situation in the contract, but the only thing I asked our attorney to do was to get me out of a contract under which I could not operate.

Q. Mr. Hanisch, didn't it occur to you to wait and let the time for the termination of the contract arrive under the notices that had been passed between the parties before you entered into this kind of litigation or set up any claim or anything of that nature?

A. I don't believe that is a completely correct statement, in that the contract was not cancelled; just one clause [207] of that contract was cancelled and in every other respect it was in effect.

The Court: Mr. Maiden, there hasn't been offered in evidence the notice of Vita-Food Corpora-

(Testimony of Arthur Hanisch.)

tion that considers the contract in default, and giving notice of rescission. Mr. Hanisch states that he considers the notice of rescission related to cancellation of only part of the contract, whereas he contended in receiving, in acknowledging receipt of that notice, that it terminated the contract for all purposes.

Now, he said in his letter, Exhibit E, also he said this: “—and we do not concede the existence of any such intermediate procedure as you suggest.”

Now, what was he talking about when he referred to “intermediate procedure” and what did Vita-Food Corporation state in its notice of termination?

Mr. Maiden: If the Court please, the letter of The Vita-Food Corporation to The Stuart Company on date of October 8, 1942, is in evidence as a part of Petitioner’s Exhibit 15.

The Court: That was offered after Exhibit E was, and the Court has not had this brought out in the record. I think you had better read that into the record, and I think we ought to get this fact cleared up before you go into any more cross-examination.

Mr. Maiden: If the Court please, the letter [208] of October 8, 1942, from The Vita-Food Corporation to The Stuart Company reads as follows:

“Gentlemen:

“In view of the position expressed by Mr. Hanisch for the first parties concerning national distribution, its development and organization, and as to your defaults in performance of

(Testimony of Arthur Hanisch.)

the above-described contract, we invoke the intermediate step provided in Paragraph 6 of the contract. You have failed substantially to meet your agreed commitments, although additional time has been granted to you by prior quota suspensions.

“You are each hereby notified that you have failed to meet your quotas for the sixty-day period from and after August 1, 1942, and therefore your exclusive right to sell under the said contract is hereby terminated in accordance with paragraph 6 thereof. This termination shall be effective sixty (60) days after the service of this notice. In all other respects, the contract remains in full force and effect.”

This is signed by Oscar Z. Wiseman, vice-president of the Vita-Food Corporation.

The Court: What do they mean by “all other respects”?

Mr. Maiden: If the Court please, I will explain that very briefly. [209]

The Court: This contract was just a contract for sale of the product by The Stuart Company.

Mr. Maiden: Paragraph 6 of this contract to which reference was made in that letter——

The Court: Well, I have Paragraph 6.

Mr. Maiden: ——provides that The Stuart Company is to have exclusive right to sell said Vitaplex and Stuart formula until November 1, 1941.

In other words, they had the exclusive right to sell those two products. And it provides that in

(Testimony of Arthur Hanisch.)

case they fail to meet the quota with respect to these products that Vita-Food could cancel that exclusive right, and that is the paragraph to which reference was made in the letter.

Now, Paragraph 19 of the contract provides as follows:

“This contract shall remain in full force and effect for the period of 10 years from and after the date hereof, and may be extended at the option of First Parties for an additional period of 10 years by written notice to Second Party, such notice to be given not less than three months before the expiration of said first 10-year period, provided, however, that this contract may be terminated by Second Party if for any 60 consecutive days, at any time after November 1, 1941, First Parties shall not [210] have purchased the minimum quantities of products hereinbefore specified in Paragraph 6 hereof, upon 60 days’ notice of intention so to do, unless during such 60-day period any such deficiency shall be removed and the minimum quantities aforesaid ordered and paid for; otherwise, all rights of First and Third Parties hereunder shall cease at the expiration of the 60-day period specified in such notice of termination.”

In other words, if the Court please, the purpose of the letter of October 8, 1942, was to serve notice of cancellation of The Stuart Company’s exclu-

(Testimony of Arthur Hanisch.)

sive right to use this Stuart formula; that is, the vitamin concentrate sold under that name. That would leave the situation that The Stuart Company could continue to use "the Stuart formula," in competition with any other parties or concerns desiring or making arrangements with Vita-Food Corporation to sell the product under that name.

Now, Paragraph 19 provides for the cancellation not only of The Stuart Company's exclusive right, but also of the right of the parties, that is, all rights of the parties under the contract.

Now, if the Court please, Exhibit 15 is the injunction suit, brought against The Stuart Company and Mr. Hanisch on November 25, 1942. This is very important. [211] The only purpose of this injunction suit was to restrain the Stuart Company from selling vitamin concentrates under the name, "the Stuart formula," which vitamin concentrates The Stuart Company had not purchased from The Vita-Food Corporation.

In other words, this injunction suit did not undertake to restrain the Stuart Company from purchasing all of the vitamins that it wanted from any other party, and selling it under any name, so long as they didn't use the name "the Stuart formula."

I might call your attention to the fact that in this injunction suit, no damage or anything of that kind is requested. All they were undertaking to do was to keep The Stuart Company from operating this trade-mark.

(Testimony of Arthur Hanisch.)

Mr. Mackay: I would like, if the Court please, for the purpose of the record, I don't want to get into a long argument about the purpose of an injunction suit. I think that will show on its face what it is. Counsel outlined—I call your Honor's attention to page 5 of the suit, where they quote, Paragraph 7 of the contract quotes: "First Parties shall handle no other products than those manufactured or produced by Second Party, and shall be the sole distributors of all products manufactured or produced by Second Party except as herein otherwise provided."

I just wanted to call that to your Honor's attention. We don't agree with counsel's interpretation. [212]

Mr. Maiden: Well, if the Court please, the Court will find in the prayer of that petition the sole and only purpose of the injunction suit, and Mr. Mackay will be forced, eventually, to agree with me.

Mr. Mackay: I am sure Mr. Mackay won't agree with you.

Q. (By Mr. Maiden): Now, Mr. Hanisch, if you know, what basis did you think you had to claiming any ownership to the trade-mark, "the Stuart formula"?

A. The letter which is in evidence from our trade-mark attorney.

Q. Well, but you must have suspected something; otherwise, you wouldn't have asked for an opinion from the attorney.

A. I got it from my attorney at the time we went

(Testimony of Arthur Hanisch.)

to him to help find out what our rights were and whether that trade-mark had ever been issued.

Q. What was the name of that attorney?

A. Fred Miller of Hazard & Miller.

Q. Did you likewise have an attorney by the name of Mr. Dunlap?

A. Yes, he was our general counsel.

Q. Did Mr. Dunlap participate in the drafting of the contract of May 5, 1941?

A. He did not. [213]

Q. He did not?

A. He saw it, he read it, and made comments on it, but the contract was drafted by Vita-Food attorneys.

Q. Isn't it a fact, Mr. Hanisch, that you and Mr. Dunlap wrote the last two provisions or three provisions in the contract with respect to setting up an arbitration board in case of disputes between the parties?

A. I can't recall whether that was the case.

Q. You have no knowledge of it?

A. No. May I amplify this? There was an original contract submitted to us which was not gone over by Mr. Dunlap. However, it was gone over by two of my associates in the business, Mr. Pelletier and Mr. Pringle, and we suggested some changes, and we then got back the revised agreement, which is substantially the agreement of May 5th that we signed.

Now, it is possible then that in Mr. Dunlap's

(Testimony of Arthur Hanisch.)

office some changes might have been made the date we signed it. I am not sure on that point.

Q. I call your attention to the fact that Paragraph 22 sets up that "any dispute arising either in the interpretation or performance of this contract shall be adjusted by arbitration as follows:—" Then it sets up the procedure for the arbitration——

A. We felt—oh, excuse me. [214]

Q. Did you ever resort to this provision of the contract to settle any of your disputes, or claimed disputes, with The Vita-Food Corporation?

A. We did not, because upon advice of my counsel, he felt that that arbitration did not apply to the type of situation we were in. I don't know the legal technicalities in the matter.

Q. Who was your attorney in that respect?

A. Mr. Dunlap.

Q. You don't know whether Mr. Dunlap drafted that provision or not? A. No, I don't.

Q. But notwithstanding the fact that you say you were dissatisfied all during the existence of this contract and wanted the contract cancelled that you were put in a hoaxed position, I believe you stated, you never did undertake to submit those difficulties to the arbitration procedure?

A. Never to arbitration. I did, however, take it up with Vita-Food officials.

Q. Now, Mr. Hanisch, if you know, what statement of facts did you give the attorneys as a basis for their giving you an opinion as to whether or not

(Testimony of Arthur Haniseh.)

Vita-Food Corporation had proper title to the trade-mark?

A. It is difficult for me to recall what those conversations with the attorney were. I believe the attorney asked me [215] when The Vita-Food Corporation applied for the trade-mark and—do you want me to recall the conversation if I can?

Q. I want you to give just as full an explanation of the facts——

A. Mr. Lewis came to me and I can't recall the date, but I think it was in the summer of 1941, stating that they had made application for trade-mark under the 1905 Act, that it had been refused because of technicalities. I don't know whether it was the use of proper names, but it was that type of technicality. He, therefore, asked me whether we wanted that thing changed. Trade-marks meant so little to me, and I said, "Don't do anything about it."

He said, "You would have a weaker trade-mark under the 1920 registration."

That was one thing I told the attorney, as I recall it.

The next thing I told him was that we had notice from Mr. Lewis that the trade-mark had been issued. That was in September of 1942. That is all of my knowledge of anything that was actually done, as I recall it, on the trade-mark up to that time.

Q. And that is all of the facts that you supplied this firm of attorneys? A. That is right.

Q. From which to reach an opinion? [216]

(Testimony of Arthur Hanisch.)

A. That is right. However, we did—I don't know whether you want me to go into this—we did very thoroughly go into the whole contract with the trade-mark attorney, because we were asking him a question about a part of the contract, and he wanted to see it all.

Q. What effort did you make to determine what the true facts were with respect to Vita-Food's application for registration of the trade-mark?

A. I made no effort whatever. I was told that they had applied.

Q. You were told that they had applied. Now, Mr. Hanisch, did I gather from your examination in chief that you represented to this Court that the Vita-Food Corporation had made some misrepresentation of facts in obtaining its registration of the trade-mark?

A. I would not say that the corporation had, because there was no misrepresentation made under the Vita-Food title.

The things that made me go into this contract, however, were representations on the part of two individuals which led up to this contract.

Q. Now, I want to know what those representations were. We have been beating around the bush here. Now, let's get down and clarify the misrepresentation which you are claiming about—— [217]

Mr. Mackay: With respect to what?

Mr. Maiden: With respect to the thing——

The Court: You don't know. We haven't heard. You don't know what those misrepresentations were.

(Testimony of Arthur Hanisch.)

The Witness: Shall I answer that question?

Q. (By Mr. Maiden): Yes.

A. The representations were as follows: One, and a very primary one, I was led to believe that this product had been developed in the laboratories at California Institute of Technology.

Q. Who made that representation to you?

A. Mr. Lewis.

Q. All right.

A. I was told that this product that was being offered to me was a natural product, similar in every respect to a product known as Galen B, which was selling at \$4.75. I was also told that they had a new, unique, exclusive and unusual method of stabilizing vitamins A, B, together with members of the B complex. I was told that they were financially dependable in every respect, that they could back up any return of merchandise, any return on a food and drug seizure. I was told that they had facilities for making tablets. I later found out that those tablets were farmed out.

They, under the contract, had the right to farm out, [218] but I was told that they had that equipment. I was told they had a very modern, up-to-date plant, with every type of scientific control, which I later found out was not the case. Those are the essential points. Excuse me—one more. I was told they had this product perfected so there was no danger we would have any trouble; that it would be uniform, stable; that it would hold up in every respect. I was also told that they had sufficient experi-

(Testimony of Arthur Hanisch.)

ence. Mr. Lewis was represented by Dr. Borsook to me as being an expert in this subject, and I took it as a statement of complete facts, which I found out was not the case later, because of the faulty products we received.

Q. Now then, all those representations were made to you by Dr. Borsook?

A. Dr. Borsook and Mr. Lewis. Now, there is another point there, however. I have a letter in which I asked on some of these points, a letter from Mr. Lewis to Mr. Charles King. Mr. King, before I got into active negotiations with Mr. Lewis and Dr. Borsook, acted as an intermediary and some of those points were cleared up with him, as an intermediary. Most of those points I have given you were a direct result of conversations with Mr. Lewis and Dr. Borsook. There is one more point to make my answer complete. May I give one more point?

Q. Oh, yes. [219]

A. There is one more point which I did not recall, but which had a very great bearing on later performance in this contract. I was told that the Galen B Company or the Galen B——

Q. When you say you were told, who told you?

A. In these conversations with Mr. Lewis and Dr. Borsook. I was told that the Galen B Company at that time was selling in Southern California 60,000 bottles of this product per month, which I later found out not to be true.

Now, the importance of that, in my mind, from

(Testimony of Arthur Hanisch.)

the standpoint of misrepresentation was one reason for the high quotas established.

Q. Now, I believe you stated already and made it very clear in the record that you never at any time regarded this trade-mark, "the Stuart formula," as being of any significance or value.

A. That is completely true, because at the time we got into this discussion I wanted and Mr. Pelletier, one of our officers, wanted me to throw the trade-mark out the window, operate as The Stuart Company and call the vitamins Stuart's Vitamins, but I had no freedom under this contract to do it, because I was forced to buy from The Vita-Food Corporation. I could not buy from anybody else. I could have operated without the trade-mark if I could have gotten out from under the contract, but I could not operate with the trade-mark under [220] this contract.

Q. Now, I am going to show you—first, I want to ask you: Is it your understanding that neither you nor any of your associates in The Stuart Company were interested in this trade-name, "the Stuart formula," as having any significance or any value?

A. Well, it had significance in that it was a way of identifying that particular product of The Stuart Company, in the minds of the doctors.

Q. Isn't that something of value; didn't you consider that something of value?

A. As I explained yesterday, it would have cost us a matter of six or seven thousand dollars to no-

(Testimony of Arthur Hanisch.)

tify the doctors that we were changing the title of that particular product.

Q. In other words, you would have been willing to have paid six or seven thousand dollars for the title to that trade-mark at any time?

A. I would have paid the equivalent of what it would cost me to change the name.

Q. And you say it would cost how much?

A. My estimate at that time was six or seven thousand dollars.

Q. Now, I show you here a letter dated December 9, 1941, and this letter is addressed to Vita-Food Corporation, signed Ludwig Lauerhass. Will you identify Mr. Lauerhass' [221] signature, and tell us who he is.

A. Ludwig Lauerhass is a man who works in our office and handles the affairs for me when I am not here. He is kind of an assistant to me.

Q. Was he an official of The Stuart Company at that time?

A. I don't believe so. He is not a stockholder.

Mr. Maiden: I would like to offer this letter of December 9, 1941, in evidence as Respondent's Exhibit G.

The Court: What is it about?

Mr. Mackay: No objection.

Mr. Maiden: This letter is addressed to Vita-Food Corporation, Attention of Mr. Lewis, and reads as follows:

(Testimony of Arthur Hanisch.)

“Gentlemen:

“You inform us that knowledge has come to you that the Rite Laboratories have prepared labels having a B complex syrup so closely resembling the Stuart formula label that confusion is certain to be created in the public mind.

“In accordance with our contract with you, it is understood that you are proceeding to protect the Stuart formula label and it is agreeable that you instruct your attorneys to act in our name as well as in your own, if this is considered desirable to effect proper protection.” [222]

The Court: Any objection? Without objection, the document is received as Exhibit G.

(The document above referred to was received in evidence and marked Respondent's Exhibit G.)

Mr. Maiden: If the Court please, it appears from the contract of May 5, 1941, that under that contract the Vita-Food Corporation was required to obtain a registration in its name of the trade name, “the Stuart formula.”

Q. (By Mr. Maiden): Now, Mr. Hanisch, I believe you testified that you attended the final conference that resulted in this agreement of November 28, 1942.

A. That is partially correct. I wasn't there—the conferences started between the two attorneys, as I recall it, about 6:00 o'clock. However, I did

(Testimony of Arthur Hanisch.)

not arrive at the conference until approximately 12:30 in the morning.

Q. Approximately 12:30 in the morning?

A. That is right.

Q. What time did that conference break up, with the agreement executed, if you recall?

A. It was very late. I can't give you the exact time. I would say roughly around 5:30 or 6:00 in the morning.

Q. Mr. Wiseman was representing The Vita-Food Corporation? A. That is correct. [223]

Q. Do you recall whether or not Mr. Wiseman had telephone conversations with Mr. Lewis during the course of those negotiations?

A. Not that I can recall. He did leave the room once or twice. Now, whether it was to look up some books or some other material, I don't know. I left the room once or twice also, and I don't recall an actual telephone conversation.

Mr. Maiden: I believe that is all, if the Court please.

The Court: Five minutes' recess.

(Short recess taken.)

The Court: Proceed.

Mr. Maiden: I should like to offer this as Respondent's exhibit next in order. This is a copy of the temporary restraining order, an order to show cause, emanating from the Superior Court of the State of California, in and for the County of Los Angeles. This was in connection with the in-

(Testimony of Arthur Hanisch.)

junction suit which was brought by Vita-Food Corporation and which is in evidence at the present time.

The Court: Without objection, it is received as Exhibit H.

(The document above referred to was received in evidence and marked Respondent's Exhibit H.)

The Court: Mr. Mackay, did The Stuart Company file a cross-complaint against The Vita-Food Corporation? [224]

Mr. Mackay: No, your Honor, they did not file one. They prepared one which we are going to put in evidence by another witness.

Redirect Examination

By Mr. Mackay:

Q. You were asked by counsel to enumerate the representations that were made to you initially to induce you to enter into this contract of May 5, 1941? A. Yes.

Q. Among those, as I understood, you referred to the representations made with respect to the fact that the product had been perfected in the California Institute of Technology? A. Yes.

Q. Also with respect to the financial responsibility of the company? A. Yes.

Q. Were there any other representations made at this particular time, as you recall?

(Testimony of Arthur Hanisch.)

A. There were two representations, which were important and which I did not completely recall in cross-examination. One very primary one—that the whole basis of our arrangement was to be a semi-humanitarian type of thing; that the profits were to be reasonable ones; that the Vita-Food Corporation would keep its profits very low and have us in a position where they could supply the vitamins for us more [225] economically than anyone else could. That was one representation.

The other one was—I don't believe I emphasized it enough on cross-examination—was that they claimed to have a new and exclusive process for doing this thing.

Q. Was that a secret process?

A. It was a secret process, yes.

Q. Now, did you later find out that any of those representations, or all of them, were not so?

A. Yes.

Q. When did you find that out?

A. With reference to which specific one?

Q. With reference to the quality, with respect to the representation in connection with the production or the perfection of the product, in the laboratories of the California Institute of Technology.

A. October of 1942.

Q. What have you to say with respect to the representation with respect to the financial ability?

A. First, in the summer of 1941, and then there was a recurrence of it about December of 1941, and again about May of 1942.

(Testimony of Arthur Hanisch.)

Q. I think you have already, in your testimony, testified with respect to when you found the product not to be what it was represented. I will not go over that now. [226]

When did you find the representation with respect to the secret process was not true?

A. In October, 1942.

Mr. Mackay: Now, if your Honor please, yesterday there was an exhibit marked for identification. I think it was 13, an opinion by Mr. Miller. May I have that at this time?

If your Honor please, counsel, in his cross-examination of this witness referred several times to the opinion given by Mr. Miller, the present attorney. I should like again, at this time, to renew my offer of this document in evidence for the purpose I expressed yesterday.

Mr. Maiden: If the Court please, I object upon the same grounds that I objected to yesterday: namely, that I am entitled to be face to face——

The Court: Why don't you subpoena the attorney who rendered that opinion? I will sign a subpoena.

Mr. Mackay: Of course, I was slipping it in for that limited purpose, showing that an opinion was given influencing these people in the Court of action. That is the only purpose; it is not to show the opinion is absolutely the law. We believe that he is a reliable attorney, but this does——

The Court: The difficulty in the issue is, as I see it, there was no cross-suit filed by The Stuart Com-

(Testimony of Arthur Hanisch.)

pany against the Vita-Food Company, but apparently there was some [227] ambiguity in the contract of May 5, 1941, as to what the rights and duties of The Stuart Company were; rights and duties upon a partial termination of the contract and also what conditions would provide the basis for one party to consider that the contract was subject to termination in its entirety.

Now, of course, there will be evidence that is not going to be produced, but the record does show that eventually an agreement of settlement was worked out, and that an agreement of settlement has been introduced in evidence. That is Exhibit 12 and that is the agreement of November 28, 1942.

Under that agreement, the Vita-Food Company agreed to dismiss with prejudice the suit, which was instituted in the Superior Court, and they agreed that the May 5, 1941, agreement was terminated and cancelled, as though it had never been executed, and the parties gave each other various quit-claims and releases.

Now, also the Vita-Food Company quit-claimed its interest in the The Stuart Formula, the trade-mark; that is, the trade name, trade-mark to The Stuart Formula, which Vita-Food Company had registered and which, under the other contract, they had title to. Then the agreement of November 28, 1942, sets forth in separate clauses what The Stuart Company would pay to the Vita-Food Company, and it is not stated just for what purposes or for what things these payments are made, and that

(Testimony of Arthur Hanisch.)

when we get over to the tax case, that is the problem that [228] is given to the Tax Court. The Tax Court is to construe the agreement of November 28, 1942, and it is to determine for what these payments were made.

Now, since that is a very difficult problem for the Tax Court, the Tax Court should have as much aid as possible from the parties themselves, and the government is contending, in this case, that all or part of these payments were for the purchase of the trade name. Now, it is conceivable that none of the payments were in consideration of obtaining title to the trade name; it is also conceivable that some part of the payments were consideration for obtaining title to the trade name. Since that is our problem and the opinion of Hazard & Miller, which was marked for identification as Exhibit 13, comes so close to the critical question, then, I feel that the Respondent's objection should be sustained and if either party wishes to lay a foundation, complete foundation, for the receipt in evidence of Exhibit 13 for identification by calling in a witness or by doing anything else, they still have the opportunity to do that.

So, at this time I will still sustain the objection to the receipt in evidence of Exhibit 13, even though I understand that petitioner is offering it for a limited purpose. Nevertheless, if it is in the record it provides the basis for argument and I think that perhaps in the end that exhibit can be received, but at this time I still do not think it should be, [229]

(Testimony of Arthur Hanisch.)

without the laying of more of a foundation for the exhibit.

Now, you wanted to go ahead with your cross-examination?

Mr. Mackay: Yes.

Q. (By Mr. Mackay): Now, Mr. Hanisch, I think one of the other representations you said that were made at the time to induce you to enter that contract was related to the quantity of sales of Galen B? A. Yes.

Q. Did you subsequently find out that that representation was not correct? A. Yes.

Q. When did you so find out?

A. In September or August; August or September of 1942.

Q. Did you subsequently find out that the representation with respect to the secret process was not true? A. Yes.

Q. When? A. October, 1942.

Q. Now, Mr. Hanisch, I call your attention to Exhibit 15 and particularly to the letter which is attached there, of October 8, 1942, to The Stuart Company, Shaler Food Products Company, Arthur Hanisch, Pasadena, California, which is from the Vita-Food Corporation. [230]

Now, near the close of the session last night you were asked by the Court, as I recall, a question as to what your situation would be if the contract were terminated, and, as I recall, you stated to the Court that there would still be some obligations upon you.

(Testimony of Arthur Hanisch.)

Now, I would ask you if you have an explanation of that statement?

A. Yes, I have an explanation. Shall I give it?

Q. Yes, please.

A. I assumed that the cancellation referred to was a specific cancellation of October 8th instead of the general principle of cancellation. As a matter of fact, when counsel asked me about it I was prepared to read—I have the letter in my hand to read—the answer to that specific letter of cancellation.

Q. I will ask you if that letter of October 8, 1942, is the only notice that you received from the Vita-Food Corporation relating to the termination of contract on their part? A. Yes.

Q. Now, I call your attention to this same exhibit, which has attached to it a printed application of the Vita-Food Corporation, United States Patent Office, and I will call your attention particularly to the following language: "The Vita-Food Corporation, a corporation duly organized under the laws of the State of California and located at Los Angeles, California, and doing business at 356 South Spring Street, [231] Los Angeles, California, has adopted and used the trade-mark shown in the accompanying drawing for a vitamin concentrate in Class 6, chemicals, medicines and pharmaceutical preparations and presents therewith five specimens showing the trade-mark as actually used by Applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the Act of March 19, 1920."

(Testimony of Arthur Hanisch.)

Now, I will ask you, if, to your knowledge, the Vita-Food Corporation had ever used the trademark, The Stuart Formula, at the time that application was made? A. No.

Q. I read again——

The Court: Would you think, Mr. Mackay, that might be a debatable point?

Mr. Mackay: Well, it may be, your Honor, but it is——

The Court: I mean, would you think also that Mr. Hanisch's answer might represent a conclusion rather than a statement of fact?

Mr. Maiden: It does, your Honor, and I object to it upon that ground, and ask it be stricken from the record.

Mr. Mackay: I should like to be heard on that. If we consider that in the light of the evidence here—we have a contract here of May 5, 1941, which specifically provides that The Stuart Company shall buy these products from the Vita-Food Corporation and that they shall be sold under [232] the name of The Stuart Formula. The evidence further shows that The Stuart Company had exclusive use of the right to sell those products under that name.

The Court: No, the contract provided that The Stuart Company had exclusive right to sell the product.

Mr. Mackay: Under that name.

The Court: No, just had the exclusive right to sell the product and then the contract provided that the Vita-Food Company was to have all right, title

(Testimony of Arthur Hanisch.)

and interest in any trade name under which the product was sold.

Mr. Mackay: I appreciate that——

The Court: So, when you asked the witness the question, whether Vita-Food ever used the trade name, The Stuart Formula, and the witness said no, of course, his answer is one that can be interpreted to mean that the Vita-Food Company did not use the trade name, in connection with the products that were sold by The Stuart Company under that contract, but the product was the product of the Vita-Food Company. It had the ownership of any trade name that was used and it had to go with the product, so it all depends on what you mean.

Mr. Maiden: I would like to make this statement——

The Court: Perhaps the Vita-Food people would claim that they had used the trade name, The Stuart Formula, because they had sold their product to a concern with the [233] understanding that it would be marketed under some name, and that it would own the name. That is why I ask you if the answer to the question doesn't involve some conclusions.

Mr. Mackay: I can see the difficulty there, your Honor, but I think I should have read the entire—the next to the last sentence here, which is more direct. [234]

It says, "This trade-mark has been continuously used and applied to said goods in applicant's business since April 5, 1941. The trade-mark is applied

(Testimony of Arthur Hanisch.)

or affixed to the goods or to the packages containing the same, by placing thereon a printed label on which the trade-mark is shown. That the mark has been in bona fide use for not less than one year in interstate commerce by the applicant.”

. Now, I want to refer, your Honor, to Exhibit 8, the contract of May 5, 1941. The sixth paragraph says “first parties shall have the exclusive right to sell said Vitaplex and Stuart Formula until November 1, 1941. Such right shall continue thereafter until and unless terminated by written notice from second party, provided, however, that such termination shall not become effective until and unless during any 60-day period between said November 1, 1941, and May 1, 1942,—” So, by the very terms of the contract the Vita-Food Corporation could not, if they lived up to the contract, sell in interstate commerce, did not sell it in interstate commerce. All I want to prove by this witness is that they didn’t.

Mr. Maiden: They did sell it, if your Honor please; they sold concentrates, bottled and labelled with “the Stuart formula,” to The Stuart Company, and The Stuart Company sold then to the general public.

The Court: Yes. It is a matter of argument whether they were justified in making that statement in their application, [235] because they are the manufacturer and the manufacturer is often said to sell goods through a distributor. So, if you want to ask Mr. Hanisch what his opinion is as

(Testimony of Arthur Hanisch.)

to whether that is correct or not, or ask him some other questions, that is perfectly all right. It takes more time, but at least in this situation we have got to take the time.

Mr. Mackay: Maybe we can clear it this way, Mr. Counsellor. Will you admit for the record that The Vita-Food Corporation never sold any of the products under the trade name "the Stuart formula" except to The Stuart Company prior to the cancellation agreement of November 28, 1941?

Mr. Maiden: I will be delighted to if I can ascertain that to be a fact, which I do not know at this time, and after I have an opportunity to confer with Mr. Lewis of The Vita-Food Corporation.

Mr. Mackay: It is a question of fact, as to whether they did. It is a question of fact as to whether it was so. It may be a question as to whether or not the mere sale of this product to The Stuart Company in legal effect was a sale in interstate commerce.

Now, we take the position it isn't because they sold it locally to us, and we became the absolute owner and sold under our name also, The Stuart Company name, never under Vita-Food, yet in this application they sold—we have sold this under our name, bona fide in interstate commerce, and [236] having been doing it for more than a year—so it is a question of fact to determine who sold what.

The Court: Well, under the sales agreement to The Stuart Company and Mr. Hanisch, you were to

(Testimony of Arthur Hanisch.)

own the trade name under which these products were resold to the public.

Now, where does that bring you? It brings you to a nice deadlock, doesn't it? It doesn't bring you out anywhere.

Paragraph 10 of the agreement of May 5, 1941, reads as follows: "Any and all trade-marks or labels under which the concentrates hereinbefore specifically described or any other products manufactured by Second Party which may hereafter be marketed or distributed or offered for sale by First Parties or either thereof, shall at all times be and remain the sole and exclusive property of Second Party," and that is just part of that paragraph.

Now, they knew that the trade name, "the Stuart formula," was going to be used, and Vita-Food knew that and so did Mr. Hanisch and his company, because according to his testimony representatives of both parties conferred with an advertising agent and they discussed the same and Mr. Hanisch has testified that he provided the Stuart part of the name. He suggested that the rest ought to be a word that would be simple and easily understood by the public, and the Vita-Food people suggested the word "formula" and so they got together. Wasn't that your testimony, or was it the testimony of the advertising [237] agent?

The Witness: No; Mr. Wiesman of the advertising agency.

The Court: So the advertising agency suggested the word "formula." Mr. Hanish said he didn't

(Testimony of Arthur Hanisch.)

want to use a word like hexylresorcinol. So the advertising agent suggested that he use a simple word called "formula," and that was the way this trade name was born and both parties knew about it.

Now, Mr. Mackay, I suggest that you ask Mr. Hanisch some factual questions if you want to, and if you want to ask him whether to his knowledge the Vita-Food people ever sold any of their products themselves under the name "Stuart formula" while the contract was in existence, you might ask him that.

Q. (By Mr. Mackay): Mr. Hanisch, can you tell the Court whether to your knowledge there were any sales made of this product under "the Stuart formula" between March—say, 1941 and November 28, 1942, except the sales that were made by The Vita-Food Corporation to you, and the sales that were made by you to the trade?

A. To the best of my knowledge, no, because had I been aware of any such sales I would have immediately filed protest because it would have been a violation of our exclusive [238] right to sell the product under that name in our contract.

Mr. Mackay: That is all.

Mr. Maiden: I have some recross.

The Court: You go ahead. Mr. Mackay is finished. You may go ahead.

(Testimony of Arthur Hanisch.)

Recross-Examination

By Mr. Maiden:

Q. Mr. Hanisch, after the agreement of November 28, 1942, was entered into, under which agreement you obtained a quit-claim from Vita-Food of the trade name "the Stuart formula," did The Stuart Company continue to use that trade name in its business?

A. The trade name "the Stuart formula" in the business?

Q. Yes. A. It did.

Q. Has it used it continuously since that time?

A. Yes. Not on all our products, but on one product or, I might better say two products, but we have other trade names. What I am trying to imply or give you is that it isn't the only name we use.

Q. What other trade names do you use?

A. At the time this agreement was signed we had another trade name, "The Stuart calcium-pantothenat." We also had the "Stuart Vitamin C." We have the "Stuart Hematinic." We have the "Stuart B Complex with C"; we have the [239] "Stuart Therapeutic Multivitamin." This is just one of our items, you see.

The Court: You mean at the present time?

The Witness: At the present time. The only one we had at that time, as I recall it, was the "Stuart calcium-pantothenate"; at the time of the settlement agreement of November, 1942.

(Testimony of Arthur Hanisch.)

The Court: At the time of the settlement agreement?

The Witness: That is right.

The Court: You received a notice of some kind of termination from Vita-Food in October of 1942, and did you after October 9, 1942, then develop another trade name or did you develop that trade name before they gave you notice of cancellation?

The Witness: Are you referring, your Honor, to the calcium-pantothenate trade name?

The Court: Yes.

The Witness: I will have to go into a little explanation on that, if you will pardon it. Mr. Lewis came to me and at that time there was a great deal of publicity on the value of calcium-pantothenate for gray hair and Mr. Lewis asked me to write in on the title of that popularity and market that product. When the matter came up we considered the trade name unimportant. We simply called it what was in the product, "Stuart calcium-pantothenate." There was no [240] trade-mark asked for, no trade-mark considered. We simply put it out as "Stuart calcium-pantothenate."

The Court: Then you did sell it; you say Mr. Lewis was with Vita-Food?

The Witness: That is right. Mr. Lewis was with Vita-Food.

The Court: And you were selling some of those products? Did you purchase that from Vita-Food?

The Witness: Yes.

The Court: That came under the heading of "other"?

(Testimony of Arthur Hanisch.)

The Witness: Other products.

The Court: Under your contract, but that was the only other product you were selling besides the concentrates?

The Witness: Up to the cancellation.

The Court: Well then, after the cancellation, then, you began selling other products, that you purchased from other manufacturers?

The Witness: That is correct.

The Court: When you did that, then, you applied your own name to those products, is that correct?

The Witness: That is correct.

The Court: Then you developed those names as you took over the product?

The Witness: That is correct.

The Court: Did you register those names yourself [241] as trade-marks?

The Witness: Yes, those names are registered.

The Court: I see.

Q. (By Mr. Maiden): I am just wondering why it is that you went to the trouble of having those trade names registered, if you didn't think they were much of a trade-mark?

A. No, but I think it is the customary thing for anyone to do, to register a trade-mark name. There was no value to them when I registered. As a matter of fact, to most of them now there is no value. They haven't shown any profit.

Q. Now, I am going to show you a letter dated February 14, 1945, and ask you if you will identify

(Testimony of Arthur Hanisch.)

this letter as going to Vita-Food Corporation from The Stuart Company.

A. That is correct, and I identify Mr. Dunlap's signature.

Q. Has this same type of letterhead been used ever since the November 28th agreement?

A. I couldn't tell you that. There have been changes and whether that has been in continuous use, I wouldn't know.

Mr. Maiden: If the Court please, I would like to offer this in evidence as Respondent's next exhibit.

The Court: Received as Exhibit I.

(The document above referred to was received in evidence and marked Respondent's Exhibit I.) [242]

Mr. Maiden: In addition to the contents of Respondent's Exhibit I, I would like to call the Court's attention to this letterhead and to the display on the letterhead of the little mark with "the Stuart formula."

Q. (By Mr. Maiden): Mr. Hanisch, calling your attention to the little blue block——

A. That is a bug. I think it is a technical term.

Q. On which appears "the Stuart formula." Is that the same bug and color and so forth that was used under the contract of May 5, 1941?

A. Are you asking, was that bug on the letterhead at that time?

Q. Well, I mean, is that the type of bug you

(Testimony of Arthur Hanisch.)

used upon your boxes and your bottles in selling the product?

A. Well, I don't see how you can compare them, because you have an entirely different situation. It certainly isn't like the label.

Mr. Mackay: If your Honor please, I don't like to interfere with recross-examination, but it seems to me that is entirely improper. None of those things were gone into on redirect examination. We have another witness here who is anxious to get away tonight, and I think it is improper recross-examination.

The Court: Well, the objection is [243] overruled.

Mr. Maiden: All I am interested in, if the Court please——

The Court: All right. Let's——

Mr. Mackay: If you will show me what you want, I would be glad to look at it and save a lot of time.

The Court: I think you asked the witness if he used that stamp on his letterhead at some previous time.

Q. (By Mr. Maiden): Did you?

A. At the date of the cancellation?

Q. Prior to the date of cancellation.

A. I can't recall when we started it. We have eliminated it now and we have made changes, but I don't know whether we were at that time——

Q. Mr. Hanisch, I call your attention to a letter dated August 25, 1942, addressed to Mr. Max Lewis,

(Testimony of Arthur Hanisch.)

care of The Stuart Company. Is that the Mr. Max Lewis of Vita-Food Company?

A. I wouldn't know. I imagine it was. This signature of Edith K. Hales—she was an employee of ours in the Chicago office at that time. I would not know the signature. I can't identify that.

Q. Can you identify this as being your type of letterhead, used by The Stuart Company, prior to the agreement of November 28, 1942? [244]

A. I assume that it must have been, because it is dated August, 1942.

Mr. Maiden: I would like to offer this in evidence, if the Court please.

Mr. Mackay: Let's see it. No objection.

The Court: Received in evidence as Exhibit J.

(The document above referred to was received in evidence and marked Respondent's Exhibit J.)

Q. (By Mr. Maiden): One other thing, Mr. Hanisch, and believe it or not I am going to quit. You spoke about certain information that you wanted to learn about the Vita-Food Corporation, before you entered into this agreement of May 5, 1941, and I believe that you stated that you undertook to elicit this information through a Mr. King?

A. That is right.

Q. Will you look this over and see if you can identify Mr. King's initials on that?

A. Yes. As a matter of fact, I have a copy of this in my files which I think Mr. Mackay is going

(Testimony of Arthur Hanisch.)

to use later on. That is, as far as I know, the letter from Charles King.

Mr. Maiden: If the Court please, I would like to offer this in evidence at this time as Respondent's next exhibit.

Mr. Mackay: No objection. [245]

The Witness: I wouldn't be able to say that that definitely is his signature, but it looks like it, as I recall. I don't know his signature well enough.

The Clerk: Respondent's Exhibit K.

The Court: Received as Exhibit K.

(The document above referred to was received in evidence and marked Respondent's Exhibit K.)

Q. (By Mr. Maiden): Now, I don't want to impose on you too much, but I have here a letter dated—that is a copy of a letter—purported letter, dated January 20, 1941, addressed to Mr. Charley King, 108 South Raymond Avenue, Pasadena, California, and that appears to be from M. H. Lewis, Treasurer of the Vita-Food Corporation.

Mr. Mackay: I have the original here and I would be very glad to introduce it in evidence. I was waiting for another witness, who was going to identify it. I would appreciate it very much if we could get another witness who is going to leave tonight. I will assure you I will put that in.

Mr. Maiden: I am awfully forgetful. I might forget it. I think that has a place in the case at this time.

(Testimony of Arthur Hanisch.)

The Court: Subject to your comparing the copy with the original—Mr. Mackay can check the copy against the original.

Mr. Maiden: Very well, your Honor. Subject to [246] verification with the original letter, the Respondent now offers in evidence a copy of a letter dated January 20, 1941, to Mr. Charles King, from M. H. Lewis of the Vita-Food Corporation.

Mr. Mackay: There is no objection to that letter.

The Court: Received as Exhibit L.

(The document above referred to was received in evidence and marked Respondent's Exhibit L.)

Mr. Maiden: I believe that is all.

Mr. Mackay: That is all.

The Court: I have one question that I think should be asked you rather than anyone else. We have in evidence Exhibit 12. It is a settlement agreement, and it calls for payments in Clauses 3 and 4. I wanted to ask you if you will look at Exhibit 12 and tell me what was the total amount you paid; what was the total amount that you personally paid?

The Witness: You mean me personally, or the corporation?

The Court: What was the total amount that was to be paid under that agreement to Vita-Food Corporation?

The Witness: \$197,000.00, part of which was contingent——

(Testimony of Arthur Hanisch.)

The Court: Is that the full amount?

The Witness: Just a moment. It is \$197,700.00.

The Court: That is the total amount; that is made up [247] of two amounts, is it not?

The Witness: It is split into three distinct parts.

The Court: Will you read the three parts?

The Witness: "\$35,000.00 upon the execution of this agreement, receipt of which is hereby acknowledged by First Party, and \$40,000.00 payable at the rate of \$4,000.00 per month, as per note executed concurrently herewith, which note shall be an obligation independent of but not in addition to the above amount."

Shall I just give you the other amount, or perhaps I had better read it all. "Second Party agrees to pay to the First Party on a royalty basis and as additional consideration for the execution of this agreement the sum of \$122,700.00 which sum is additional to the above-mentioned \$75,000.00.

The Court: Now, over what period of time—you paid \$35,000.00 upon the execution of this agreement; \$40,000.00 to be paid over a period of 10 months——

The Witness: That is right.

The Court: And \$122,700.00 to be paid on a royalty basis.

The Witness: Shall be paid at the rate of 7½ cents per unit of vitamin concentrates as sold and marketed by Second Party, beginning October 1, 1943, and continuing until the said sum of \$122,700.00 is fully paid.

(Testimony of Arthur Hanisch.)

The Court: Now, has that sum been fully [248] paid?

The Witness: Yes.

The Court: When was it fully paid?

The Witness: I would have to have—I would have to hazard a guess on that.

Mr. Mackay: There is an exhibit, Exhibit 5 that shows when it was paid.

The Court: Oh, that is the exhibit I was confused about yesterday.

The Witness: There is a listing of those payments.

The Court: Exhibit 5. Perhaps you can explain this to me?

The Witness: I hope I can.

The Court: What would you say was the time when your final payment was made, the last payment was made; 1945 or 1944?

The Witness: I would assume from this that it is April, 1945. Yes, April, 1945.

The Court: The taxable year in this case is what?

Mr. Mackay: 1943, 1944 and 1945; March 31st.

The Court: Does the issue in this case take us up to the end of payments involved?

Mr. Mackay: Yes. Eighteen thousand and some odd dollars into '46.

The Court: All right. Now, what did you mean in your settlement agreement in Clause 4 when you said, "Second [249] Party agrees to pay to First Party on a royalty basis and as additional consid-

(Testimony of Arthur Hanisch.)

eration for the execution of this agreement the sum of \$122,700.00, which sum is additional to the above-mentioned \$75,000.00. The said \$122,700.00 shall be paid at the rate of 7½ cents per unit of vitamin concentrates as sold and marketed by Second Party beginning October 1, 1943, and continuing until the said sum of \$122,700.00 is paid. A unit of vitamin concentrates is hereby defined and agreed to be the equivalent of one pint or 96 tablets of the product now being sold and marketed under the trade-mark 'the Stuart formula' at the potencies now in effect in the Stuart formula liquid. Such payments shall be paid on the equivalent of the said unit of vitamin concentrates whether the same shall hereafter be sold and marketed in liquid, tablet, or in any other physical form or whatever the size of the package or packages by Second Party, whether sold under the trade-mark 'the Stuart formula' or not''?

Now, what does all of that mean?

The Witness: We wanted to set up a measure. In other words——

The Court: I guess I will have to ask you something more direct than that. That agreement was executed on November 28, 1942. Now, on November 28, 1942, were you selling any vitamins that were manufactured by anyone other than the Vita-Food Company? [250]

The Witness: No.

The Court: Then, did you intend selling any vitamin products after November 28, 1942, which

(Testimony of Arthur Hanisch.)

would be manufactured by some concern other than the Vita-Food Corporation?

The Witness: Yes, after the cancellation.

The Court: What date is the cancellation regarded as having actually taken place or being effective?

The Witness: I believe November 28, 1942.

The Court: That was the understanding of the parties?

The Witness: Yes.

The Court: If you were to pay $7\frac{1}{2}$ cents per unit of vitamin concentrates, that would mean you were going to pay them $7\frac{1}{2}$ cents per unit of vitamin concentrates, which you would sell after November 28, 1942, which you might purchase from some other concern, isn't that right?

The Witness: That is correct.

The Court: Why did they want you, and why did you agree to pay them $7\frac{1}{2}$ cents for any vitamins made by anyone else that you might sell?

The Witness: It was a method of measuring the payments. We agreed to a settlement. They wanted part in cash and I agreed to pay part on a contingency basis; that is, if and when we sold vitamins.

The Court: What would a sale of a unit of [251] vitamin concentrates mean?

The Witness: A unit, as it is defined there, has a retail price of \$2.30. It is a pint of liquid or 96 tablets.

The Court: The unit is supposed to be 96 tablets?

(Testimony of Arthur Hanisch.)

The Witness: Yes. It was purely a measuring stick.

The Court: Any other questions?

Mr. Maiden: I have one further question, if the Court please.

Q. (By Mr. Maiden): Mr. Hanisch, was the summons in respect to the injunction suit which is in evidence, I believe as Petitioner's Exhibit 15, and the restraining order issued by the court, pursuant to the prayer of that injunction petition served on you or The Stuart Company prior to November 28, 1942?

A. The summons was served before that; the Thursday before, I think. I don't know.

Q. Then, the restraining order was likewise served prior to that date?

A. I don't know about that. I don't recall and I had forgotten there was such a thing, but I do know the summons were served on me at my house.

Q. You do know there was a restraining order served on you, or The Stuart Company?

A. I have forgotten about it. I hadn't thought about it since then, and it had completely slipped my memory. [252]

Q. Let's see if we can refresh your memory. Will you look that over and see if you recall receiving a copy of that temporary restraining order?

A. Would it indicate here it was served on me at my office or my home? That might help refresh it.

Q. I don't believe it does show. I simply wanted

(Testimony of Arthur Hanisch.)

to know whether or not you have any knowledge of this having been actually served upon you.

A. I cannot definitely say that I have that knowledge.

Mr. Mackay: May I ask, counsel, have you examined the record of the County Clerk to see whether or not such a notice was served? If you have——

Mr. Maiden: I have not checked it yet, but I intend to prove the date of service, if necessary, but I will check and give you my statement on it and then we can stipulate.

Mr. Mackay: We will take care of that later on.

Q. (By Mr. Maiden): This one last question and I am through. I believe you stated that you placed orders with the W. T. Thompson, William T. Thompson Company, in December of 1942?

A. I believe the first orders were placed in December.

Q. When did you receive the first delivery under those orders, Mr. Hanisch?

A. I am not in a position to tell you that. It takes some time to get merchandise through, but I wouldn't know the [253] exact date.

Q. I believe under this agreement of November 28, 1941, it is shown that you had outstanding with Vita-Food Corporation at that time at least two unfilled orders, Nos. 36 and 37. Do you recall that?

Mr. Mackay: Just a moment. I think you referred erroneously to the agreement of 1941.

(Testimony of Arthur Hanisch.)

Mr. Maiden: It should have been November 28, 1942.

The Witness: Yes, at that time we did have orders and we made provision for taking in those orders in this cancellation agreement.

Q. (By Mr. Maiden): As you best recall, were those two orders sufficient to take care of your business up until, say, March 31, 1943?

A. I wouldn't be in a position to say exactly, because our inventory varied and your sales varied, so I couldn't tell you that.

Mr. Maiden: That is all.

Mr. Mackay: If your Honor please, I should like to adjourn at 5:00 o'clock tonight, because I have a very important engagement that has been made for quite some time. I had another witness here, but there is only about nine minutes and I was wondering if it would be well to start with him tonight or wait until tomorrow.

The Court: If you will bear with me for [254] just a moment, I will give you an answer in a minute. I think that you could swear in the witness and just start.

Mr. Mackay: My associate, Mr. Dunlap, will call Mr. Miller.

Mr. Dunlap: I wanted your Honor to be informed that I shall be called as a witness in this case. I do not expect to argue my testimony, and if there is any rule of this Court which would prohibit my testifying subsequently, having examined this witness, I would like to inquire.

The Court: Yes, we do have that rule. Our general rule is that if an attorney is going to be a witness in the case, he should not participate in the trial.

Whereupon,

GEORGE MILLER

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: George Miller.

Direct Examination

By Mr. Mackay:

Q. Mr. Miller, what is your occupation?

A. Pharmacist.

Q. And how long have you been a pharmacist?

A. I have been a registered pharmacist since 1922. [255]

Q. Have you been carrying on that profession since that time?

A. Yes, and before that time.

Q. Before that time? A. Yes, sir.

Q. Whereabouts?

A. In Cleveland, Ohio; State of Michigan; Detroit in particular; Greater Detroit; City of Philadelphia; City of New York; City of Trenton and City of Chicago.

Q. What is your occupation at the present time?

A. I am president of Strong Cobb and Company, Incorporated, of Cleveland, Ohio.

(Testimony of George Miller.)

Q. Now, will you please tell us who Strong Cobb is?

A. Strong Cobb is a private formula manufacturer, in business since 1933, manufacturing products under direct or laboratory formulations, produced either by the customer or by our own laboratories for people in the industry, particularly national distributors of products, both in the proprietary field, which is the patent medicine field, and particularly in the ethical field, which is for the sale to the druggists, under the doctor's prescriptions.

Q. What do you mean by ethical, now, please?

A. The so-called ethical field pertains to items which are sold to the druggists and sale of which is caused by detail work to the physician. [256]

Q. Well, how does the Strong Cobb Company compare with other similar institutions in strength?

A. Well, Strong Cobb is very financially sound. It is the largest private formula manufacturer in the world today.

Q. What do you mean by "formula maker"?

A. We have in our laboratory functions many research technicians and chemists who can produce a given formula or a vehicle for formulas, depending upon the needs or the wants of the national distributor of preparations.

Q. When did you first hear of the vitamin products sold under the name "the Stuart formula"?

A. In, I believe it was in October, 1942.

Q. October, 1942?

A. Yes, sir.

(Testimony of George Miller.)

Q. Did you make an examination of that at that time, that product?

A. The product itself was picked up by our Mr. H. A. Strathe, vice-president in charge of sales, and sent into the home office for duplication. We made a very thorough examination of the product. In fact, we picked up several other samples at that time and found a very great variance in the product itself as to taste, layer construction and also in a peculiar blowing reaction of the product at that time.

It was a very simple matter for us, with [257] our knowledge of the vitamin field to duplicate that product, knowing the basic ingredients as stated on the label.

Q. In your examination did you determine what the base of the ingredients were?

A. The base of the ingredients which we received at that time was molasses, which is a forbidden thing in a pharmaceutical field.

Q. Why is it forbidden?

A. Because of its fermentation blowing properties, it cannot be controlled under all conditions.

Q. How long had it been known to be improper?

A. Well, I have only been in the drug business for approximately 40 years and I have known it since the first year I was in the drug business. It goes back to the old days when the mothers fed molasses to the baby with a little sprig of lemon, just for a cold.

Q. From your examination of this product, in

(Testimony of George Miller.)

your opinion, was there any secret, secrecy about the development of the product?

A. There is nothing new, novel or secret, except good pharmaceutical knowledge of the proper use of a vehicle to carry the known vitamins as expressed on the label of that product.

As you know, those vitamins need careful handling, due to the fact that they have to have specific—without [258] getting too technical—specific acidity or alkalinity to preserve their potencies. That is a matter known to the trade.

Q. Can you tell the Court what other ingredients were in that product, except molasses?

A. In the original product?

Q. Yes.

A. There was Vitamins A, D, B1, B2, Vitamin C, calcium-pantothenate. I believe there was Vitamin C in one of the vitamins we picked up. CC doesn't hold in solution. There was calcium-pantothenate, pyridixon, niacin, plus the possibility of some natural rice brand concentrate, which was hard to trace.

In other words, we did not examine that product analytically, and I am merely giving you the items that were stated on the label of the package itself.

Q. Well now, Mr. Miller, the vitamins that you found to be contained in this product, were they of unusual character?

A. No, they were all commercially available.

Q. Commercially available?

A. Commercially available. Every one of them.

(Testimony of George Miller.)

Q. What do you mean by that?

A. Vitamins A and D are extracts of fish, extracts of the soupfin shark, particularly, and other fish in varying [259] degrees of potency. Vitamin B1 originally contained natural substances and later synthesized by many of the pharmaceutical manufacturers, such as Murck, Pfeiser and Hoffman, LaRoche, and a few more of the smaller commercial manufacturers.

Vitamin B2 originally was contained in what they called Solvamin, which was an extract of corn, and the patent rights of which were held by the Commercial Solvents Corporation. The government later contended that neither the B2 nor B1 obtained from such sources could be considered as natural substances. Nalpin is another one of the vitamin commercial as Vitamin B6 contained in either yeast or liver or similar natural substances. They were produced synthetically. All these vitamins were commercially available from all the manufacturers of chemicals.

Mr. Mackay: If your Honor please, I dislike to ask the Court to adjourn at this time, but I am forced to go, because of a prior engagement. I will finish this witness in a very short time in the morning.

(Witness temporarily excused.)

The Court: We will recess until 9:30 tomorrow.

(Whereupon, at 5 o'clock p.m., an adjournment was taken until 9:30 a.m., Friday, January 30, 1948.) [260]

January 30, 1948

The Court: Proceed.

Whereupon,

GEORGE MILLER

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Mackay:

Q. Mr. Miller, last night I think we were talking about Vitamin C in liquid form. Have you anything to add to that?

A. Yes. I made a modified statement and I checked with my west coast representative. I said that I believed that Vitamin C was present in liquid form. I was mistaken in that statement. What I was thinking about was the formulation of the vitamin tablets, which do contain Vitamin C as a component part.

Q. Now, did your company manufacture and sell any vitamins during this period from 1941 to 1942?

A. Oh, yes, great quantities of vitamins.

Q. Have you an idea about how many?

A. Well, for example, we won the Army and Navy E in the government for vitamin work and other confidential work. We produced probably

(Testimony of George Miller.)

3,000,000 tablets for the Army and [262] Navy from that time on.

Q. Now, you spoke about the two methods or manners of distributing products. I think you mentioned one, the proprietary and the ethical.

A. That is right.

Q. Now, can you please explain to the Court the importance of a trade name with respect to the proprietary; that is, compared with respect to the ethical?

A. There is quite a distinct difference between what we called a so-called trade-mark and the proprietary or patent medicine field, which is sold to the consuming public, and the trade-mark which is sold to the physicians or the ethical field.

In other words, what I mean by ethical field is direct contact with the physician who, in turn, prescribes it on a written prescription to be sold at a registered drug store, and that is this: The ordinary conception of a trade-mark in the patent medicine field would include such products as Alka Seltzer, Bromo Seltzer, Salhepatica, Ipana Toothpaste, and all you have to do is to turn on a radio to hear Fred Allen or Walter Winchell selling products to the public.

Q. To the ultimate consumer?

A. To the ultimate consumer. That name, then, a trade-mark is a trade way of selling that particular product. It becomes what we call a franchise item. By franchise I mean [263] they have developed a name in the trade by merchandising and

(Testimony of George Miller.)

advertising through magazines, newspapers, radios and what not.

On the other hand, an ethical trade-mark is dependent entirely in my own experience, which is quite long along that line, in that the direct approach is made not to the lay public but to the practicing physician, and he is acquainted particularly with the type of formulation in that particular product. He is also acquainted in cases of vitamins, potencies, balance of the structure of the particular products, and he then relies practically, entirely, not on the name that is presented to him on a new item in particular, but on the honesty and integrity and the control of the manufacturer selling that product. So, you have got an entirely different value between trade names in the ethical field and trade names in the patent medicine or proprietary. The name of the manufacturer is the most important factor in the ethical field.

Q. You mean the manufacturer or supplier?

A. Oh, supplier; that is right. I beg your pardon. We call them distributors, too.

Q. Well, could you illustrate some of the leading companies who operate through the ethical way?

A. Yes. A great number of very fine companies who have a complete representation through clinical research; people like Parke Davis & Company, Sharp and Dome, Winthrop, [264] Abbott Laboratories, E. R. Squibb & Son, Stuart Company today, the Dillon Company and many other smaller com-

(Testimony of George Miller.)

panies. Even people like Lakeside Laboratories in Milwaukee, very fine people, do an outstanding job.

Q. Well now, for instance, take a company like Squibb that operates in an ethical way. Does the name of their products have particular significance, I mean, on the label as contrasted to the label which would show as a Squibb product?

A. Well, the Squibb label itself and the Squibb trade-mark of integrity is something that is outstanding. Squibb, as you know, make a great number of products. They are also making a great number of household products. The name "Squibb" stands for integrity and confidence. It is a label itself.

Q. Now, what have you to say with respect to the difficulty of changing a trade name that has been used on an ethical product?

A. It is not particularly difficult, nor is it too expensive to change a name, and with your Honor's permission, picking up the drug I mentioned yesterday, Hexylresorcinol, Sharp & Dome, who are the manufacturers and have the patents on Hexylresorcinol for a period of 17 years, being the founders of that name, have difficulty particularly when it came to the use of that drug in a mouthwash, so they changed [265] it to STT37, which is much simpler. They did that simply by contacting the sales departments. The detail men called on distributors and they sent out three or four series of letters to all the doctors in the territory in which they were promoting the item. There was no diffi-

(Testimony of George Miller.)

culty at that time. As a matter of fact, I was in the ethical drug operation at that time, and there was no change except in the listing in our want books of the new name.

Q. I think you spoke about the integrity of the supplier. I think you also spoke about research and control. Will you please explain briefly what you mean by control?

A. Control is the all important factor in a pharmaceutical industry. Adequate laboratory control starts from the crude material base in which every single item, every component part, regardless of its importance or regardless of its active ingredients, must be checked very carefully. We have found even at times labels are placed on wrong packages. For example, a rejection was made in our laboratory a short time ago of a carload of calcium carbonate. A carload of carbonate was rejected due to the fact that our laboratory found iron filings in very minute quantities in this particular car. Upon investigation we found they used iron filings to blow out the vats in the manufacture or purification of these particular goods, and somebody forgot to remove it. That goes not only—— [266]

Mr. Maiden: If the Court please, Mr. Miller runs far beyond the scope of the question asked him. I want to call the Court's attention, if I may, to the fact that the real issue and the only issue in this case is how much did The Stuart Company pay Vita-Food Corporation for this trade-mark, this trade

(Testimony of George Miller.)

name. There is no issue in this case as to fraud or as to the contract compliance or anything else. The only issue is what did Stuart Company pay The Vita-Food Corporation for the trade-mark.

Now, Vita-Food Corporation did not sell to The Stuart Company any concentrate. It only sold the name. The record will show that after this contract of November 28, 1942, the Stuart Company no longer used any of the vitamin concentrates manufactured by Vita-Food Corporation. I believe we are getting way beyond the real issue in this case and taking up needless time with a lot of immaterial matter.

The Court: Is The Stuart Company still using the name "the Stuart formula"?

Mr. Mackay: Yes, your Honor.

The Court: Then this seems to be all hypothetical. They didn't change from one name over to another. You are asking the witness about the needs and practicality of changing the trade name from one name to another, and this company didn't change from one name to another. So you are dealing with something that is speculative as far as I can see, and [267] a lot of this is cumulative. I think the suggestion is very well made.

Mr. Mackay: I will bear that in mind. I would like to make this observation, of course, that the evidence shows that the parties were contemplating, at least the officers of The Stuart Company were contemplating, the change of the name to show the unimportance of this particular trade name.

The Court: Yes, but they didn't change the name, and you are taking up a great deal of time.

(Testimony of George Miller.)

Mr. Mackay: I will shorten it, your Honor. I will keep that in mind.

The Court: We haven't time to explore a subject that isn't material.

Q. (By Mr. Mackay): I will call your attention to Exhibit 9 and to the label which is on the left side of the white paper. That has been identified as a label which was used by The Stuart Company prior to November 28, 1942, and particularly to the question or statement there: "An aqueous concentrate derived from natural food sources, fortified."

Mr. Mackay: I might state, your Honor, that that was changed as shown here by the other one.

The Court: That was a very small change, Mr. Mackay. The average person in the public wouldn't even notice it, unless they were accustomed to reading fine print on the labels. [268]

Q. (By Mr. Mackay): May I ask if a doctor would notice that? A. Yes.

The Court: That is right, a doctor would notice it. So would a trained person, but the point is the name "Stuart formula" was still used and the subject is practically the same, and it was still a vitamin concentrate.

Q. (By Mr. Mackay): You stated, Mr. Miller, that you had examined this product in October, 1942.

A. Yes, sir.

Q. I will ask you from your examination if that statement I just called your attention to on the label was correct?

A. Misleading in its entirety.

(Testimony of George Miller.)

Q. I will ask you if you were interested——

The Court: Did you say correct or corrected?

Mr. Mackay: I asked him if it was correct, and he said it was misleading.

The Court: You mean it was a natural?

The Witness: No, it was misleading. The statement says "natural food sources, fortified."

The Court: We have been all over that. It was represented to Mr. Hanisch that it was a natural vitamin and it has been testified at one time Vitamin C, derived from corn, was said to have been—was it Vitamin C? [269]

The Witness: Yes.

The Court: ——derived from corn, was said to have been a natural. At one time it was said to have been a natural vitamin, isn't that right?

The Witness: Yes. It has changed since then.

The Court: So this all has to do with the development of vitamins and the analysis of them and it is not really strictly material to the question we have before us. Now, what is the next question?

Q. (By Mr. Mackay): As a result of your examination of the product in 1942, was your company interested in manufacturing that same product?

A. No, we were not.

Q. Why not?

The Court: Whose company?

The Witness: Strong Cobb & Company.

The Court: Interested in manufacturing what product?

The Witness: "Stuart formula."

(Testimony of George Miller.)

Mr. Mackay: The product was then being manufactured by The Vita-Food Company.

The Court: What is the materiality of this, please?

Mr. Mackay: Well, if your Honor please, our case is just this: At this time——

The Court: Well, your case is what the intent of [270] the parties was in executing the agreement which is in evidence as Exhibit 12, upon which there has been very little evidence. Now, I will at this time return the agreement to you, Mr. Mackay, with this comment: This exhibit was received in evidence yesterday, or the day before, as Petitioner's Exhibit 12. I received it in evidence because I thought that it was for the convenience of counsel to offer it at that time. There has not been an adequate foundation laid for the receipt in evidence of this agreement. The testimony of Mr. Hanisch has been completed, direct and cross-examination. He was asked very little about this settlement agreement and I think that it was improper to receive it in evidence at the time it was received. Therefore, I am going to now reject the document and have it marked for identification as Exhibit 12, and ask you at the appropriate time to introduce some evidence relating to the settlement agreement; why it was entered into, what the intent of the parties was, and that is what your case is about.

Now, that will indicate to you why I will sustain the objections to a lot of descriptive testimony about

(Testimony of George Miller.)

the general business of the marketing of vitamins.
Read the last question.

(The question was read.)

(The document heretofore marked Petitioner's Exhibit No. 12 was rejected.) [271]

Mr. Maiden: If the Court please, I would like to move that that answer be stricken from the record as being irrelevant and immaterial to any issue in this case.

Mr. Mackay: I would like to be heard on that.

The Court: Mr. Miller, when did you begin manufacturing a vitamin for The Stuart Company?

The Witness: The first invoice is dated August, 1943.

The Court: Now, from your testimony it appears that these vitamins that were sold to the public are something of a prescription.

The Witness: That is right.

The Court: They are compounded probably in very much the same way as a tablet which has two or three ingredients in it?

The Witness: Yes, your Honor.

The Court: Like empirin with codine in it, or something like that? You buy codine in wholesale quantities; you buy the other ingredients in wholesale quantities. Now, after every vitamin has been developed it became—the different commodities became, the different vitamins became commercial commodities and, apparently, anyone wanting to go into

(Testimony of George Miller.)

the business of selling them can do just that as they can go into the grocery business, but there are business standards and there are professional standards that have to be [272] followed.

Now, we have been told a great deal about that. You apparently were asked to put up a product for The Stuart Company in—what date did you say?

The Witness: August, 1943.

The Court: August of 1943, and at a certain time you stopped doing that. Is that right?

The Witness: No.

The Court: You just testified that you did. You were no longer interested in——

The Witness: In October of 1942.

The Court: When did you begin?

The Witness: August, 1943.

The Court: You couldn't begin in 1943 and end in 1942.

The Witness: I am sorry. You misinterpreted. We were requested to quote on a product. [273]

The Court: I want to cut short this extensive testimony on immaterial matter. Now, did you make up something that they sold?

The Witness: Not until August of 1943.

The Court: All right. When did you stop making it?

The Witness: Never stopped.

The Court: Now, what is the meaning of your last question to Mr. Miller, about which he started to testify that at some time they were no longer interested in making something?

(Testimony of George Miller.)

Mr. Mackay: Our position is this——

The Court: I know what your position is. What is your last question to this witness?

Mr. Mackay: My last question, I think, was whether his company was interested in making the product of The Stuart Formula at that time, which had a molasses base. That was for the purpose——

The Court: We have had just reams of testimony on the point that nobody wanted to make up a vitamin with a molasses base. Now, you didn't want to and you never did, did you?

The Witness: No, sir.

The Court: All right. That ends that.

Mr. Mackay: That is all.

The Court: Mr. Maiden. [274]

Cross-Examination

By Mr. Maiden:

Q. Mr. Miller, I believe you testified that you first saw The Stuart Formula, that is the concentrate, in October of 1942. A. Yes, sir.

The Court: What do you mean by "concentrate"; this liquid stuff?

Mr. Maiden: The liquid stuff.

The Court: All right.

Q. (By Mr. Maiden): What was the occasion for your first seeing samples of that Stuart Formula?

A. A request for a quotation from The Stuart Company.

(Testimony of George Miller.)

Q. What sort of a request did The Stuart Company make of you?

A. Asked us if we could make this product and what price we would make.

Q. What time in October of 1942 was that, do you recall?

A. I don't know the date. That is a long time ago.

Q. Did they present some samples of the formula to you?

A. We picked up the samples ourselves from trade shelves. We do that, as a matter of fact, of course——

Q. Was that product being sold in your territory at that time? [275]

A. Never heard of it, sir.

Q. Never heard of it? A. No, sir.

Q. How many separate samples did you have?

A. If I recall, at that time, approximately three or four were sent in by Mr. Strathe, our sales vice-president.

Q. Where was Mr. Strathe located?

A. In Cleveland, but he had been traveling the West Coast.

Q. And he picked up three or four samples?

A. That is right.

Q. Did all those samples bear control numbers?

A. I don't remember.

Q. No recollection of that at all?

A. No analysis was made of the product; merely physical observation.

(Testimony of George Miller.)

Q. What is a control number?

A. A number given to the product at the time of manufacture to identify the date and time and the methods under which it was manufactured.

Q. Does that appear on the label?

A. Appears on the label of every good pharmaceutical company.

Q. You would assume they had control numbers, is that right, since they were picked up off the shelves? [276]

A. I don't know. I can't answer that.

Q. Is it lawful to sell them without control numbers on them?

A. Yes, sir.

Q. It is. Did you have any written report made for you on those samples?

A. By our laboratory?

Q. Yes.

A. No. No analysis was made; merely physical observation and immediate recognition of the base of the product.

Q. In other words, you did not actually analyze the liquid; you simply looked at it and read on the label its contents, is that right?

A. That is right.

Q. Then you state that from that information you determined that you could duplicate that concentrate?

A. Without the base, with a different base.

The Court: Well, in liquid form or——

The Witness: In liquid form, your Honor, yes.

The Court: What was the base you were going to use?

(Testimony of George Miller.)

The Witness: Malt, which is recognized as a standard and very acceptable base; different types of malt.

Q. (By Mr. Maiden): Now, sir, have you been testifying here from any kind of written report or are you just testifying from your [277] memory?

A. From my memory.

Q. I believe the Court brought out the fact that you do now supply The Stuart Company with its concentrate and that you have been supplying The Stuart Company since August of 1943.

A. That is right.

The Court: They are still selling vitamins in liquid form?

The Witness: Yes, your Honor.

The Court: That is what we mean when we use the term "concentrate," is that right?

The Witness: Yes.

The Court: Otherwise we call it capsules, tablets?

The Witness: We call it liquid syrup vitamins.

The Court: Then, let's call it by its right name.

Q. (By Mr. Maiden): Is The Stuart Company now one of your large customers?

A. Yes, they are.

The Court: How much do you sell them a year?

The Witness: At the present time—it has varied anywhere from \$100,000.00 up to approximately \$785,000.00—pardon me, your Honor, I don't have those figures with me, but approximately in that neighborhood. [278]

(Testimony of George Miller.)

The Court: Sell them anything else besides the liquid vitamins?

The Witness: Yes, we have made up and created new products for The Stuart Company. The syrup is only a fraction of that.

The Court: What other products?

The Witness: We make the Stuart tablets, which are the A, B, C. We make the hematinic, which is a liver and oil; AB-complex, which is a high potency; B-complex, and a dental product known as Viorol.

The Court: Those are all sold under various names?

The Witness: Yes, your Honor.

The Court: Is The Stuart Formula used only on the syrup-vitamin?

The Witness: To the best of my recollection, The Stuart Formula is used on the liquid.

The Court: Only on the liquid?

The Witness: To the best of my recollection.

The Court: But you are not sure of that?

The Witness: That is right. It may be used on the tablets. I am not sure of that. I haven't seen the label for some time.

Q. (By Mr. Maiden): Mr. Miller, are the vitamins, the liquids and the tablets that you manufacture for The Stuart Company, and other [279] items that you manufacture, natural or synthetic?

A. A combination of both. The vitamins themselves in most cases are synthetic, with the exception

(Testimony of George Miller.)

of vitamins A and D, and the vitamins contained in it are not even considered in figuring potencies.

Q. Now, I want to ask you to examine this bottle of Vitall, which is the product of The Vita-Food Corporation, and I will ask you to examine **that** and state if that doesn't have a molasses base.

A. On the label it states "Cane plant concentrate" and could well be a molasses base.

Q. You interpret that as being a molasses base?

A. Normally, or sorghum.

Q. Would you please open that bottle? I believe you testified——

The Court: Have you a spoon?

Mr. Maiden: I didn't bring a spoon.

Q. (By Mr. Maiden): Now, I want you tell the Court whether or not that shows any fermentation.

A. I wouldn't like to judge from a physical look of the product. I would like to take this through the laboratory and find out. We have regular fermentation checks.

Q. Mr. Miller, I understood you to say on your direct examination that you didn't have an analysis made of that [280] concentrate, that you only examined what it contained.

A. The analysis was made on the active ingredients of the product itself. The fermentation was evident because the bottle popped, and we ran through a fermentation of the product at that time, but that is a physical check, not a strictly chemical analysis.

Q. How do you check for fermentation?

(Testimony of George Miller.)

A. We have a recognized fermentation check, which is recognized by the American Pharmaceutical and the Food and Drug Administration.

Q. Does this indicate any fermentation to you?

A. As I said before, I would rather not pass judgment. Fermentation can be in small quantities, depending on the age of the product too.

Q. Do you detect any fermentation on that?

A. Not at the moment.

Q. I believe you testified on direct examination, that is, in effect, that molasses had been forbidden for many years in the pharmaceutical field, because it always ferments.

A. Unless processing is taken to completely pasteurize and sterilize the molasses to remove the normal bacterial content. You see, molasses is the base for the creation of yeast and alcohol. It is highly fermentable.

Q. So, simply having a molasses base doesn't always mean you will have fermentation? [281]

A. Not if proper measures are taken, and proper pasteurization, but that is a very expensive process.

Q. Do you know that The Vita-Food Corporation has been selling this product for over five years on the market?

A. I never saw it before.

Q. You don't know that?

A. I don't know that product.

Q. Now, I believe you stated on your direct examination that you could take a product and, just by examining its label, noting its contents. just by

(Testimony of George Miller.)

a visual inspection, you could determine that you could duplicate that product?

A. In most cases that is generally true, yes.

Q. I didn't understand that you made any exceptions.

A. Well, the pharmaceutical field is a tremendous field. The chemical field is, too. I couldn't be that brazen. I am speaking of normal, standard formulation, yes.

Q. I will ask you to examine the contents of that bottle and tell the Court whether or not you can duplicate that product.

A. I can duplicate the product as far as the active ingredients are concerned, but I don't care to fool around with a cane sugar base; that is, an extract base, they call it, which would be molasses.

Q. So that you admit here, now, that you cannot duplicate that product? [282]

A. I didn't say that. I said I don't care to duplicate it.

Q. Well, I want to know if you can duplicate it.

A. If you ask that as a special research job, yes, we can do it.

Q. You can? A. Yes.

Q. Notwithstanding that you have no idea on earth how the composition is made?

A. After all, you are stating active ingredients, and that is the important part of that product. The base is just flavor, and immaterial.

Q. Isn't there some special skill or knowledge in the blending of these various vitamins in the base?

A. *Secundum artem*. That is the most honored

(Testimony of George Miller.)

expression in the pharmacopoeia. That means excellence in the art of compounding.

Q. So that there are no longer in the pharmaceutical field, so far as you know, any formulas for making any of the medicines and vitamins and things of that nature, that are secret and that are not known by all the manufacturers?

A. With the exception of certain patented marks which none of us will touch. The chemical science has advanced to a point where qualitative and quantitative analyses can be made on practically every product on the market. [283]

Q. Was that true in January, 1941?

A. Yes, sir.

Q. Now, you spoke of many vitamin products. I will ask you if, in 1940, in the beginning of 1941, if the vitamins that were put out didn't contain just the single vitamins.

A. No, that is not true. The advent of vitamins goes back to cod liver oil, when we put up a U.S.P. standard of vitamin A and D. Companies like Parke-Davis put out Irdola which is a combination of A, B, and B-complex. The Lilly Company put out Melvaron which contained A and D and B-complex factors, in a palatable syrup base.

Q. Now, did you ever see or test any of The Stuart Formula tablets? A. No, sir.

Q. You did not? A. No, sir.

Q. When you testified that, as of October, 1942, there was nothing new or unusual about The Stuart Formula composition, did you mean for the Court

(Testimony of George Miller.)

to understand that this was true in January, 1941?

A. I would say yes.

Q. That is your positive statement on that, Mr. Miller?

A. Yes, sir.

Q. Mr. Miller, when you removed that top from this [284] bottle of Vitall, you didn't notice or hear any popping sound?

A. No, sir, but it is a bad cap. It is a sprung cap.

Mr. Maiden: That is the liquid concentrate, your Honor, that we have been speaking about.

I believe that is all.

The Witness: Thank you.

Mr. Mackay: That is all.

(Witness excused.) [285]

Whereupon,

ROBERT H. DUNLAP

called as a witness for and on behalf of the Petitioner, having first been duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Robert H. Dunlap.

Direct Examination

By Mr. Mackay:

Q. Mr. Dunlap, what is your occupation?

A. Attorney at law.

Q. How long have you been an attorney at law?

A. Twenty-six years.

(Testimony of Robert H. Dunlap.)

Q. Where are you now practicing?

A. Pasadena, California.

Q. How long have you been in Pasadena?

A. Ten years.

Q. Are you acquainted with Mr. Hanisch?

A. I have known Mr. Hanisch since September, 1914.

Q. Have you been his attorney since approximately December, 1941?

A. Yes, sir, and before that.

Q. Did you assist in the organization or organize the Stuart Company and the Shaler Food Products Company?

A. I did.

Q. After they were organized, did you become the counsel [286] or attorney for those two companies?

A. Yes, sir.

Q. Did you also become an officer of either one of the companies, or both?

A. Of both of them.

Q. In what capacity?

A. Secretary of the Stuart Company and, after the middle of 1942—prior to that time assistant secretary—secretary of the Shaler Food Products Company, during its entire corporate life.

Q. Were you secretary of the Stuart Company from, say, about June, 1942, up to and including at least November 28, 1942?

A. Up to the present time.

Q. Were you familiar with the fact that the Stuart Company was under contract to purchase Vita-Food products from the Vita-Food Company?

A. Yes, sir.

(Testimony of Robert H. Dunlap.)

Q. I show you a contract at this time and ask you to please identify it, or rather, I show you an instrument and ask you to identify it.

A. This instrument was typed by myself in my office during the night of November 27th and 28th. The signatures on the document are respectively that of Mr. Oscar Wiseman, Mr. Manisch, and myself; my own signature. The initials in several [287] places in the contract, "R.H.D.," are my initials.

Mr. Mackay: Now, if your Honor please, at this time I introduce the exhibit which was received as Exhibit No. 12, and now, at the Court's order, has been marked for identification as Exhibit 12. I made the same statement that the secretary had not made a true and correct copy in that the interlineations had not shown themselves. At this time, with your Honor's permission and counsel's permission, I should like to offer the duplicate original here, which is signed and which has been identified by this witness.

Mr. Maiden: No objection.

The Court: You mean you want to substitute that exhibit marked for identification?

Mr. Mackay: Yes, your Honor.

The Court: All right. You may do that. Mark it for identification.

Mr. Mackay: I am offering it in evidence now.

The Court: Is this the settlement agreement?

Mr. Mackay: Yes.

The Court: You haven't laid any foundation for that. That is the whole basis. We don't know

(Testimony of Robert H. Dunlap.)

the intent of the parties, the circumstances under which they executed it, or anything else. If I am correct in my recollection of the record, isn't that right? If I am incorrect, I would like to clear it up in my mind. [288]

Mr. Mackay: Well, I think it is probably best that I do lay a more sufficient foundation and I appreciate your suggestion.

Q. (By Mr. Mackay): Now, Mr. Dunlap, this agreement is entitled—that you just identified—“Agreement of Settlement of Litigation and Cancellation of Contract.” A. Yes, sir.

Q. Now, I will ask you if you are familiar with any litigation which was at that time pending or threatened between the Stuart Company on the one hand and the Vita-Food Corporation on the other.

A. Yes, indeed; very familiar. I had worked for approximately three weeks off and on in drafting a complaint for cancellation of the contract of May 5, 1941, charging fraud, charging failure of consideration.

Q. Just a moment. I would like to ask you if you were familiar with the contract which—this contract I now have in my hand—you were attempting to cancel and which was referred to in the heading, “Agreement of Settlement of Litigation and Cancellation of Contract.” A. Yes, sir.

Mr. Maiden: Read that, please.

(The record was read.)

Mr. Maiden: I object to that on the ground, if

(Testimony of Robert H. Dunlap.)

the [288A] Court please, that calls for a conclusion of the witness on the issue that is within the province of this Court to determine, and that is what the money set forth in this agreement was paid for, whether it was paid for the formula or whether it was paid for the cancellation of the contract.

Mr. Mackay: I can't put it all in at once.

The Court: The question is, whether he was acquainted with another agreement. If I might suggest, Mr. Mackay, I think the question would be better if you would ask the witness if he is acquainted with the agreement of May 5, 1941, which is Exhibit 8 in this case.

Mr. Mackay: Yes, your Honor. I think that is more scientific.

Q. (By Mr. Mackay): I call your attention, Mr. Dunlap, to the first paragraph of the agreement you identified, which refers to the agreement of May 5, 1941, which has been introduced in evidence here as Exhibit 8.

A. I was then and I am today.

Q. Now, will you please tell the Court, as briefly as you can, the nature of the litigation and the disputes that were then being had between the two companies, which led to the drafting of the contract which you have identified here and which is dated November 28, 1942?

A. Mr. Mackay, I did not finish my statement in answer [289] to your question. There was also not only threatened the litigation, which I was about to file, but there had actually been filed the com-

(Testimony of Robert H. Dunlap.)

plaint which has been introduced in evidence here, Superior Court case, I think it is Exhibit 15.

Mr. Maiden: That is correct, Mr. Dunlap. It is correct, Exhibit 15.

The Witness: That case was pending. The disputes between the parties, I will try to make that brief, were that The Stuart Company claimed to own the trade-mark, "The Stuart Formula."

The Court: What is that?

The Witness: The Stuart Company claimed to own the trade-mark, "The Stuart Formula."

The Court: Will you make that plainer?

The Witness: For the first time, in October of 1942, the Vita-Food Company insisted that The Stuart Company and Mr. Hanisch could not distribute any vitamins or vitamin concentrates or pills unless they were purchased from the Vita-Food Corporation. The Stuart Company contended that the product being supplied to it by the Vita-Food Corporation was endangering the business of the company and that, not only was the Stuart Company but its officers were in danger of being subjected to a Food and Drug Administration penalty and perhaps prosecution.

The Vita-Food Company claimed to own the trade-mark, [290] "The Stuart Formula." The Vita-Food Company claimed that The Stuart Company could not use its own name in distributing vitamins.

That is all that I recall at the moment. There were more. I am trying to make it brief.

(Testimony of Robert H. Dunlap.)

Q. (By Mr. Mackay): Now, Mr. Dunlap, did you, as secretary and counsel of The Stuart Company, carry on the negotiations principally with anybody representing the Vita-Food Company?

A. I did. I had four conferences with Mr. Oscar Z. Wiseman.

Q. Who is Mr. Wiseman?

A. Attorney for and vice-president of Vita-Food Corporation.

Q. Did you try to get in touch with Mr. Lewis?

A. I did.

Q. Were you able to?

A. Mr. Lewis referred me to Mr. Wiseman and stated he wanted all negotiations conducted with Mr. Wiseman.

Q. Did you carry on the negotiations then, you and Mr. Wiseman, after that?

A. Yes. I carried on all the negotiations except for two conferences, one on Sunday afternoon, November 20th, and the other on the 27th, which resulted in the signing of the document, Exhibit 12 for identification. [291]

Q. Well, you stated a moment ago that you became—I will withdraw that.

When you had your controversy with the Vita-Food Company at that particular time, did the registration of the trade-mark come up?

A. Incidentally.

Q. Did you pass upon it or did you seek the advice of other counsel?

A. Both. I pulled the books off the shelves

(Testimony of Robert H. Dunlap.)

myself, and I also sought the advice of other counsel.

Q. As to what?

A. As to who owned the trade-mark, "The Stuart Formula."

Q. And what was the advice?

A. The advice was that The Stuart Company owned it.

Q. Do you know for what reason?

A. Yes. This is a 1920 Act registration. A true trade-mark has to be a coined word or a symbol. The true trade-mark cannot consist of a combination of proper names or dictionary names. It must be a coined word or a symbol. A 1920 trade-mark registration, a 1920 trade-mark is acquired by the actual user and it can be registered, which produces prima facie evidence of ownership, but only prima facie evidence of ownership after it has actually been used in interstate commerce for one year, exclusively by the person whose name is connected with the trade name, by the consuming public for the trade. [292]

Q. Now, Mr. Dunlap, I refer you to Exhibit 15 and particularly to a letter dated October 8, 1942, which is attached to that exhibit and appears to have come from the Vita-Food Corporation to The Stuart Company.

A. Yes, sir.

Q. Did you receive that letter at that particular time or were you consulted about it?

A. I saw it about a half hour after it was received at the offices of The Stuart Company.

(Testimony of Robert H. Dunlap.)

Q. And that letter, I think, purports to be a declaration on the part of the Vita-Food Corporation, they intended to cancel the contract with respect to certain particulars?

A. That is correct, with respect to certain particulars only, but you will note that it also contains the language, "In all other respects the contract remains in full force and effect," meaning that the Vita-Food Company still contended that The Stuart Company had to purchase all of its products from the Vita-Food Corporation.

Mr. Maiden: Now, if the Court please, I am going to ask that Mr. Dunlap participate in this case as a witness only and not undertake to argue the merits of this case and to inject into this case his legal opinions. He is here as a witness to testify as to facts only. I object to his last statement and ask that it be stricken from the record, as being argumentative and improper. [293]

The Court: I don't think that was argumentative. We have seen the letter before. He is referring to a sentence in the letter.

Q. (By Mr. Mackay): That letter refers to a paragraph 6. You said you were familiar with paragraph 6 of the agreement?

A. Exhibit 8, yes.

Q. Will you please tell the Court what the effect of cancellation of that paragraph 6 would be, as required in that notice of November 8th?

Mr. Maiden: That calls for the legal opinion of this witness. He is not testifying as to facts.

(Testimony of Robert H. Dunlap.)

He is trying to get into the record his own legal interpretation of this contract.

The Court: Is there any meeting between the parties as to the meaning of clause 6 in that agreement? I understood there was not. In fact, I believe yesterday you stated that the clause in paragraph 6 related to exclusive rights to sell. Isn't that true?

Mr. Maiden: Yes, that is true, your Honor.

The Court: But, if certain conditions were not met, that the exclusive right to sell would end upon giving notice, isn't that right?

Mr. Maiden: That is right.

The Court: Isn't this cumulative testimony here? [294]

Mr. Maiden: It certainly is cumulative testimony and it is boring upon an attorney undertaking to get his opinion to the Court.

The Court: He can testify as an expert witness.

Mr. Maiden: That is true, but he hasn't been so qualified as an expert witness.

The Court: Maybe Mr. Mackay thought he qualified him as an expert.

Mr. Mackay: He has been a lawyer for 26 years. He is an expert on that.

The Court: If there is any ambiguity on the contract, we must know the intent of the contract. Is there anything ambiguous in clause 6 of the contract?

Mr. Maiden: Your Honor, it is just as plain as anything could possibly be.

(Testimony of Robert H. Dunlap.)

The Court: All right. Then there can't be very much objection to Mr. Dunlap's testifying about it.

Mr. Maiden: I have no objection to his testifying what his understanding was that the various provisions should mean, as going to the intent of the parties. The thing I was objecting to, if the Court please, was his giving a legal opinion here as to what effect, as a matter of law, a certain provision in the contract would have. I believe the Tax Court is fully competent to take care of that matter.

Mr. Mackay: I will withdraw that. [295]

The Court: No, just ask your witness over again. The objection is overruled for the present. Will you start all over again on that? I think it is important.

Q. (By Mr. Mackay): Mr. Dunlap, in the letter of October 8, 1942, next to the last paragraph, it states in effect that The Stuart Company had failed to meet its quota for a 60-day period and that therefore your exclusive right to sell under said contract hereby terminates in accordance with paragraph 6 thereof. Now, I will ask you what effect upon the company, the company's earning capacity, the termination of only that right to exclusively sell would have had upon the company.

A. Well, the company was losing money at the time. I am sorry I can't answer your question directly. I will say that we—I was and we all were, "we" meaning the company, extremely anxious to have this contract terminated. We couldn't make

(Testimony of Robert H. Dunlap.)

money as long as the contract was in effect, whether it was exclusive or non-exclusive.

Q. Now, you stated you got in touch with Mr. Lewis regarding the difficulties you were having.

A. I tried to, but I talked to Mr. Wiseman.

Q. Yes, and that he referred you to Mr. Wiseman. Now, you did go to Mr. Wiseman. Did you have a conference with him?

A. I had three conferences.

Q. Will you please tell the Court when you had the [296] first conference with Mr. Wiseman and the substance of the conversation you had with Mr. Wiseman at that time?

A. May I refer to my diary?

Q. Quite all right.

A. If you want the exact dates, I can give them to you.

The Court: What office did you hold with the company at that time?

The Witness: Secretary. I will give you all these dates, if I may. May I do that, your Honor, so as not to have to refer to the diary again?

On the Thursday before November 20, 1942, that would be November 17, 1942——

Q. (By Mr. Mackay): Is that the first conversation you had with him? A. It was.

Q. Will you please state to the Court the substance of the conversation?

A. I told Mr. Wiseman that we were entirely dissatisfied with the performance of the Vita-Food Corporation, that Mr. Lewis had gone back on

(Testimony of Robert H. Dunlap.)

some—so many promises, that the contract was fraudulent in its inception; that they never did have a natural vitamin base; that the Stuart Company simply could not go ahead with the outrageous—I remember using that expression—pricing of the product to the Stuart Company and that we were going to break with the Stuart Company—with the [297] Vita-Food Corporation.

The Court: What did you mean when you used the term “outrageous price”?

The Witness: I told Mr. Wiseman at that time that we had learned during the previous month that the 50 per cent payment, which was being made on placing the order, was more than the entire cost of the orders to the Vita-Food Corporation. I told him that we had obtained quotations from reputable manufacturers, who actually had a plant and controls to give us a better product for not as much as two-thirds of the price we were paying the Vita-Food Corporation.

In other words, we could buy for two-thirds, or one-third less, a better product from a reputable manufacturer, who would sell us something that wasn't exploding and embarrassing the company and wouldn't subject us to the criticism for short count in the tablets. I told him that consistently and persistently the tablet preparations were short in count. I, myself, had counted the tablets, and we had that verified by a certified public accountant. I told him we had obtained information that the original Stuart formula, instead of being the

(Testimony of Robert H. Dunlap.)

result of studies by the California Institute of Technology, actually was made in a garage; that the original product, the original batch delivered under the February 3, 1941, agreement, was unstable and it was prepared in three days' time and they could not possibly have a stable product because it [298] would take much longer than that to run the tests necessary to bring out a reputable drug item. I told Mr. Lewis that we were through, that I was at work at the time—told Mr. Wiseman that I was at work at the time on a contract, on a complaint charging fraud, charging the failure of consideration, and asking for a declaration of rights, and I would give him 48 hours to make up his mind whether he desired to accept the proposition of settlement which I then made to him.

The Court: What was that?

The Witness: I told him first we would pay him \$15,000.00 for the entire business, plant—entire business of the Vita-Food Corporation; that we would pay them the cost of the merchandise they had on hand, but we were not going to pay any such inflated price as the Vita-Food Corporation was then getting from The Stuart Company. I told him, to sweeten the transaction, so that Mr. Lewis would not be out of business with no occupation, we would for a while employ him in a consulting capacity to advise our new manufacturing connections and to advise with us concerning such manufacturing problems as might arise in connection with the change-over to a new supplier. At that

(Testimony of Robert H. Dunlap.)

conference, I believe, I got as high as \$50,000.00.

Q. (By Mr. Mackay): Now——

A. Mr. Wiseman said they wanted a half a million dollars. [299]

Q. Now, did you—this conference, of course, was after you received the termination notice of October 8th?

A. Yes, and after we had applied to the——

Q. Subsequently to this first conference, did you have a subsequent conversation with Mr. Wiseman?

A. I did, for 2½ hours, on the afternoon of Sunday, November 20, 1942.

Q. Where was that?

A. Part of the time in my office in Pasadena. Mr. Hanisch was also present, and part of the time at a restaurant across the street.

Q. Was Hanisch present at the restaurant?

A. He was.

Q. Can you give the Court the substance of that conversation?

A. Yes. Mr. Hanisch stated that he wanted to make one final effort to arrive at a settlement of the disputes between the parties, and I think he used the expression, "Get off the hook with Vita-Food and get a reliable manufacturer," and he was prepared to pay more than I had previously offered, because he did not want to drag The Stuart Company through the courts because necessarily it would be a bitterly fought case and we would have to establish the fact that we had been selling a product which was not reliable, unstable, did not

(Testimony of Robert H. Dunlap.)

meet Food and Drug requirements, unsatisfactory to the doctors and the [300] consuming public.

Mr. Maiden: You are making an excellent advocate, Mr. Dunlap.

Mr. Mackay: Pure statement of facts. I am very proud of him.

The Witness: I stated what Mr. Hanisch said. Mr. Wiseman maintained, he said he didn't want to get into too many personalities about the matter; if we were going to make a settlement, keep personalities out of it. Mr. Wiseman said he wanted—I think his first statement was—\$350,000.00.

The Court: Who said that?

The Witness: Mr. Wiseman—to divorce the relationship between the parties so that we could go out and buy from whomever we chose.

The Court: We will take a short recess at this time.

(Short recess taken.)

The Court: Proceed.

The Witness: Your Honor, may I correct the dates in my testimony. My first meeting with Mr. Wiseman was on November 18th, a Wednesday. Next was on November 20th, a Friday.

Q. (By Mr. Mackay): Now, the evidence shows the complaint was filed by the Vita-Food Company, which is now Exhibit 15. I will ask you if you, as the attorney for The Stuart Company, had [301] prepared a complaint against the Vita-Food Corporation.

(Testimony of Robert H. Dunlap.)

A. Yes, a longer one than Mr. Wiseman filed in his first complaint.

Q. You mean he beat you to it?

A. He beat me to it.

Q. Have you got a copy of it?

A. Yes, I have for my files one of the copies of the document. I had many, but in order to save filing space, I destroyed all but this one.

Q. Was this complaint filed in court?

A. It was not filed in court.

Mr. Mackay: I should like to offer in evidence, if your Honor please, a copy of this complaint.

Mr. Maiden: This doesn't seem to be a complaint, Mr. Mackay. It is not signed or verified in any respect. The one that you have given me, anyway.

Q. (By Mr. Mackay): Was it signed?

A. Never was; never filed.

Q. That is the draft of the complaint you had intended to file against them?

A. That is correct.

Mr. Maiden: I have no objection to it.

The Court: Did Mr. Hanisch see this?

The Witness: Oh, yes; thoroughly discussed it with [302] him, your Honor. As a matter of fact, that is about——

The Court: Did he approve of it?

The Witness: Qualifiedly. He didn't think it was strong enough.

The Court: I don't like to be meticulous about

(Testimony of Robert H. Dunlap.)

this, but I would suggest this be marked for identification.

Call Mr. Hanisch and ask him about it, because, after all, Mr. Dunlap was acting in the capacity of counsel.

The Witness: And secretary.

The Court: Yes, but then Mr. Hanisch was really the man that was director of the company, wasn't he?

The Witness: That is right, true.

The Court: And he was really your client?

The Witness: That is true.

The Court: He may have been acting in dual capacity, but he was the boss.

The Witness: Definitely.

The Court: So, let's have this marked for identification, then, as Exhibit 16. I believe that is the next number.

The Clerk: Yes, your Honor. I don't seem to have Exhibit 15 amongst the Court's exhibits. That was a complaint.

The Court: I think counsel are using some of those exhibits, and the Court can get them back after while.

(The document above referred to was marked Petitioner's Exhibit No. 16 for [303] identification.)

Q. (By Mr. Mackay): Now, Mr. Dunlap, as a result of the negotiations which you had with Mr. Wiseman, was there a contract entered into?

A. A settlement?

(Testimony of Robert H. Dunlap.)

Q. Yes. A. Yes.

Q. And that has been referred to here as the document identified as—or submitted for identification as—Exhibit 12? A. Yes, sir.

Q. I will ask you to please tell the Court—to study that document and from your knowledge tell the Court—just what you were trying to say.

A. We were trying to get rid of the pending litigation and we were trying to divorce ourselves entirely from the Vita-Food Corporation and all relations with them, and settle our various disputes, principally trying to get for Mr. Hanisch and The Stuart Company—and I advisedly say Mr. Hanisch and The Stuart Company—freedom to go out and buy a better product at a lesser price so that at long last The Stuart Company could begin to make some money.

At that time Mr. Hanisch held notes of the company for \$70,000.00. He had an extremely unsatisfactory product. He was pouring money into trying to sell it, and the company was [304] pouring money——

Mr. Maiden: I object to that answer as going far beyond the scope of the question.

The Court: You may cross-examine, Mr. Maiden.

The Witness: Incidentally and as a very minor matter, in order to wash up the whole thing, I suggested getting a quitclaim of whatever rights there might possibly be, so that they couldn't raise it again—from the Vita-Food Corporation of the

(Testimony of Robert H. Dunlap.)

trade-mark, "The Stuart Formula." We believed we owned it at that time, but the objective that we had was so that we could at long last go out and have this company begin to make some money.

Q. (By Mr. Mackay): What significance did the words "cancellation of contract" have in the heading?

A. That was the principal part. We wanted to get rid of the litigation so that we wouldn't have to prove what an inferior product we had been selling.

Q. Did the litigation arise because of the contract of May 5, 1941?

A. Yes, because of the contract of May 5, 1941. At the very time of the notice of cancellation—at the time that it was in preparation by the Vita-Food Company—I was already at work on a—that is complaint marked for identification Exhibit 16, to rescind the agreement in its entirety. In other words, by that time we became very sorry we had ever met Mr. [305] Lewis.

Mr. Maiden: Thank you, Mr. Dunlap.

Q. (By Mr. Mackay): Now, at or about the time this cancellation agreement was entered into, were there discussions with respect to the continuance of Mr. Hanisch's ownership of the stock and also his requiring him to manage, continue as managing agent of The Stuart Company?

A. Very definitely and extensively.

Q. And who insisted on those provisions going in?

A. Mr. Wiseman.

(Testimony of Robert H. Dunlap.)

Q. Do you know for what reason?

A. Mr. Wiseman said that in his opinion Mr. Hanisch was the sparkplug of the Stuart Company, and without Mr. Hanisch nothing would happen; it wouldn't be any good, wouldn't do any business; and he wanted Mr. Hanisch to be tied in and remain as managing agent of The Stuart Company and continue to devote a great portion of his time to The Stuart Company so the job of merchandising would go on, and get the payment per bottle provided for in paragraph 5, whether the name of "The Stuart Formula" was used or not.

As a matter of fact, I had given my opinion——

The Court: Don't go beyond the scope of the question.

The Witness: All right. [306]

Q. (By Mr. Mackay): I call your attention to paragraph 3—or 7, I mean, of the agreement.

A. In the event of the abandonment of the trade-mark——

The Court: He hasn't asked you a question.

Q. (By Mr. Mackay): I call your attention to paragraph 7, and particularly to what is indicated there as an insertion in the contract after it had been typed, "of the abandonment of said trade-mark, 'Stuart Formula,' by said party."

Who said that? A. Mr. Wiseman.

Q. Now, Mr. Dunlap, that agreement I believe provides that The Stuart Company would pay a total of \$197,700.00. A. Yes, sir.

Q. As I recall, \$35,000.00 was to be paid in cash,

(Testimony of Robert H. Dunlap.)

and the balance, \$40,000.00, in monthly installments of \$4,000.00 each. I think also the contract provides that \$122,700.00, or the balance of the \$197,700.00, be paid over a period of time and based upon unit sales.

A. Right.

Q. Now, Mr. Dunlap, can you tell the Court what, in your opinion, that payment was made for, the \$197,700.00?

Mr. Maiden: I object to Mr. Dunlap's giving any of his opinions. I want Mr. Dunlap to testify as to intentions. [307] He can do that. What was the intention of the parties—but I object to his giving any opinion.

The Court: Objection sustained.

Q. (By Mr. Mackay): I will withdraw that. I will ask you what was your intention, as an officer of the company, with respect to the payment of that sum of money.

A. The intention was to place The Stuart Company in a position so that it could buy a product at a realistic price and make a profit. A better product at a lesser price would put the company in the black, and we wanted to get the freedom.

Q. Freedom from what?

A. From the obligation to buy only from Vita-Food.

Q. And those obligations were under the contract of May 5, 1941?

A. Correct. We wanted to settle all disputes with Mr. Lewis and the Vita-Food Company. We

(Testimony of Robert H. Dunlap.)

wanted to get back the stock which had been promised him, but which had not been issued.

Q. Promised whom? A. Mr. Lewis.

The Court: How many shares?

The Witness: 300 shares, your Honor.

The Court: Which company?

The Witness: The Stuart Company—in order to be [308] factually accurate, your Honor, he was to get 150 shares of the Shaler Food Products Company and 150 of The Stuart Company, as originally set up, and when the companies merged, that meant 300 shares in The Stuart Company.

Q. (By Mr. Mackay): Explain what you mean by “merged.”

A. Under the California Civil Code there is a provision for merging one corporation into another. That statutory procedure was followed and the two companies were actually merged. The Shaler Food Products Company was merged into The Stuart Company. We wanted to get also out of the necessity of exposing or trying the lawsuit and thereby arming the competition with information as to the character of our product which we were then selling. Incidentally, Mr. Hanisch did not wish to have his own son's name—that is, Stuart—used by anyone else than himself.

Q. How would a litigation affect—what did you think at that time, what effect did you think the litigation would have had upon the business of The Stuart Company, its name?

A. Well, a product which was being sold for hu-

(Testimony of Robert H. Dunlap.)

man consumption, we didn't care to prove it was actually compounded in a kitchen of a Mr. Ellis, who was an instructor at the California Institute of Technology at that time. We didn't want to prove that the product was exploding and had been exploding, and apparently Mr. Lewis could do nothing about it. [309] We didn't want to prove that the label statement that the product was compounded primarily from natural source was actually misleading. We didn't want to prove that there was no such thing as a secret process involved in the production of the then "Stuart Formula." We didn't want to be in the position of proving that the Vita-Food Corporation was of little or no financial responsibility and that we had been dealing with that kind of a manufacturer. We didn't want to prove that. We didn't want to supply information which might have led to a Food and Drug seizure, all of which would have been used to our detriment by the competitors.

Q. I will ask you, Mr. Dunlap, to explain what you had in mind when you wrote paragraph 4 of the agreement.

The Court: Of what?

Mr. Mackay: Of the agreement of November 28, 1942, which is marked for identification as Exhibit 13.

The Witness: I knew that if we were paying a royalty, we were recognizing some kind of ownership. Therefor, I insisted on the use of the expression "royalty basis" so that it would not appear we

(Testimony of Robert H. Dunlap.)

were paying a royalty to anybody. I had in mind that that was merely a means of describing the measurement of payments, so much a bottle. I will amplify that. If we could save, and we knew we could save, by purchasing a better product from a more reliable manufacturer, we could well afford to pay 7½ cents a bottle, because we were going [310] to make 22 cents more on every bottle of tablets sold. I had in mind that these payments were to be made on any product that we sold, and I call your attention to this: "Whether sold under the trade mark, 'The Stuart Formula,' or not"—in other words, no matter what The Stuart Company sold, no matter what they called it, we still had to pay the 7½ cents a bottle. As the potencies were increasing, we made larger payments up to 12½ cents. I also had in mind this——

The Court: Would potencies increase the sale price, that is, the amount The Stuart Company could get?

The Witness: No, your Honor.

The Court: It wouldn't?

The Witness: It's very easy to explain. We were selling at \$2.30 then, and the product today has been improved so that it would probably have to sell for \$5.00 a bottle—added more of the vitamins. I can't give you the quantities.

The Court: That is what I asked you. If you sold something that had an increased potency, wouldn't it sell for more on the market?

The Witness: Well, it didn't, your Honor, be-

(Testimony of Robert H. Dunlap.)

cause the prices of these products came down. May I finish?

Mr. Mackay: Yes.

The Witness: You asked me what I had in mind in writing paragraph 4. I would like to state this: that the payments were divided into three sections; the first one was a [311] cash payment, the next a note signed by The Stuart Company and Mr. Hanisch, and the third was a Stuart Company obligation alone.

Q. (By Mr. Mackay): You mean with respect to the \$122,700.00?

A. Yes, that is correct. Mr. Hanisch actually that night signed a note for \$40,000.00 payable to the Vita-Food Corporation.

Q. Now, do you remember when that contract was signed?

A. Ten minutes after 6:00 on the morning of November 28th.

Q. When was the contract drafted?

A. During the whole night?

Q. Was Mr. Wiseman present?

A. He was.

Q. Who else?

A. Mr. Hanisch. Mr. Hanisch joined us shortly after midnight.

Mr. Mackay: If your Honor please, I should like to offer in evidence the exhibit identified as Exhibit 13—12, I mean.

Mr. Maiden: No objection. You are now putting this in evidence?

(Testimony of Robert H. Dunlap.)

Mr. Mackay: The original in place of the other.

The Court: Received as Exhibit 12.

The Clerk: Exhibit 12. [312]

(The document heretofore marked Petitioner's Exhibit No. 12 was received in evidence.)

Mr. Mackay: Will you take the witness. [313]

Cross-Examination

By Mr. Maiden:

Q. Are you still connected with The Stuart Company? A. Yes, sir.

Q. Are you its attorney? A. Yes, sir.

Q. Are you an officer of the company?

A. I am.

Q. Do you draw any compensation from The Stuart Company as an officer? A. No, sir.

Q. You never have? A. No.

Q. You are on a retainer fee basis as that attorney?

A. No, I have arrangements on a per diem basis.

Q. I guess that would cover your participation in the trial of this case?

A. That is correct. I expect to paid on a per diem basis for my appearance here.

Q. Now, Mr. Dunlap, there has been some testimony here about the discussion of the contract of May 5, 1941, Exhibit 8. A. Yes, sir.

Q. Did you draft any part of that agreement?

A. No. I would like to explain. An agreement

(Testimony of Robert H. Dunlap.)

was presented to me about the 24th, on the 24th of April, 1941. I [314] didn't like it. I redrafted the agreement, turned it over to Mr. Hanisch, and he in turn turned it over to Mr. Lewis. Mr. Lewis, in my presence, said he would not accept any of my suggestions. This was going to be the contract or else there would be no deal.

Q. Well, then, what occurred?

A. What occurred?

Q. Yes, after he rejected your draft, then was this draft drawn?

A. Yes, sir; drawn by Mr. Overton, so I was told by Mr. Lewis. [315]

Q. In other words, there is no language in this agreement that originated with you?

A. I don't know. They might have accepted from my other draft. I haven't checked it with the draft I prepared. Something with reference to an arbitration clause. They might have accepted some of that.

Q. Was it your idea of inserting in the agreement this arbitration arrangement, Mr. Dunlap?

A. I don't know whether I suggested it or Mr. Hanisch suggested it. I don't like it. Probably he did. I don't like arbitration agreements; don't think they mean anything in this——

Q. You read over the agreement, though, I presume?

A. Yes, sir.

Q. And did you think you understood the agreement at the time, the agreement when you read it over?

A. Yes, I did.

(Testimony of Robert H. Dunlap.)

Q. Well, I am going to ask you to read Paragraph Second of this agreement and tell me what you understood that to mean at the time it was written.

A. I understood it to mean that the Stuart Company recognized that the Vita-Food Corporation owned the trademark, The Stuart Formula.

The Court: Paragraph 2 or Paragraph—

Mr. Maiden: It is Paragraph 2 on page 3, your Honor. [316]

The Witness: Paragraph 10. I understood the parties intended—that the Vita-Food Corporation should own the trademark. At that time I did not profess anything.

Q. (By Mr. Maiden): You mean since that time you have become an expert in the field of trademark law?

A. Well, I hate to call myself an expert. I have done considerable work in connection with trademarks for this and other companies.

Q. But since this time?

A. That is right.

Q. Now, Mr. Dunlap, you stated that The Stuart Company was anxious to get out from under this contract. A. Certainly.

Q. When did that desire come to The Stuart Company first?

A. On October 1, 1942, when for the first time Mr. Hanisch obtained definite information he could buy the pills and the goo, as we call it, on—for 30

(Testimony of Robert H. Dunlap.)

cents a bottle less than we were paying, two-thirds of the cost.

Q. In other words, your desire to get out from under this contract came over you when you found out that you could buy this vitamin concentrate at cheaper prices and that occurred in October of 1942?

A. That is right. [317]

Q. Prior to that time you had had no such desire to get out of the contract?

A. Oh, I didn't like the contract.

Q. That doesn't answer my question, Mr. Dunlap.

A. I would say that—yes, get out of the contract. That was a 10-year deal. We continued to believe until about the middle of June, I am answering your question, 1941, that these representations about humanitarianism—there was really something to them. In June of 1942 Mr. Lewis and Mr. Harnisch had conferred and I knew about it because I think I talked to Mr. Lewis on one of those occasions, concerning a modification of the agreement to reduce the quotas and make it so that they could provide some semblance of fairness to the relationship between the parties.

Now, I can say there was a desire to produce a modification of the agreement as early as June, 1942.

Q. Now, just as much as we can—now, I appreciate your extreme interest in this case, but just as much as we can, please try to answer my questions as directly as you know you should answer them.

A. All right.

(Testimony of Robert H. Dunlap.)

Q. Then if there is anything that Mr. Mackay wants to straighten out, of course, he will have an opportunity on redirect examination, and I would appreciate that courtesy from you. [318]

Now, Mr. Dunlap, I believe you heard Mr. Harnisch state on direct examination that he didn't consider the stock of The Stuart Company to be worth anything. A. On November 28, 1942?

Q. And at any time during 1942. Did you hear him make that statement on direct examination?

A. I did.

Q. Are you wholly in agreement with that statement? A. In 1942, I am.

Q. Were you in agreement with a statement that this stock had no value as of July 31, 1942?

A. The stock of The Stuart Company had no value as of July 31, 1942?

Q. Yes.

A. Marketwise, it had no value. As a matter of fact, the Commissioner of Corporations didn't think it was worth one dollar a share.

Q. I believe, however, that a letter you wrote to the Corporation Commissioner, Mr. Dunlap—in that letter you represented to the Corporation Commissioner that that stock was considered to be valuable security. Now, in view of your previous statements, was the statement to the Corporation Commissioner a misrepresentation of facts on your part, deliberate or unintentional?

The Court: What exhibit is that? [319]

(Testimony of Robert H. Dunlap.)

Mr. Maiden: That is Exhibit, Respondent's Exhibit C.

Q. (By Mr. Maiden): I will call your attention to the next to the last paragraph on the second page of that letter, and I will ask you to read that.

A. "You should be informed that all the stockholders of The Stuart Company have agreed between themselves by endorsement on the stock certificates that they will not sell or offer to sell their stock to any person outside the present stockholders without first offering the same to such present stockholders. You are further informed that none of the stockholders has any present intention of disposing of what they all believe to be a valuable security."

Q. Now, will you answer the question.

A. With Mr. Hanisch in the company, I think any company Mr. Hanisch is connected with is going to be a success. He has proved that.

Q. Well, you haven't answered my question.

You just stated that you agreed with Mr. Hanisch's testimony—that this stock didn't have any value.

A. I do.

Q. And now you come along and you are shown a letter wherein you represented to the Corporation Commissioner that this was considered to be a valuable security. [320]

A. They believed it to be a valuable security if Mr. Hanisch continued with the company, devoted his efforts to it and took no salary, which he was not taking and didn't take until last November.

(Testimony of Robert H. Dunlap.)

Q. Why, then, did Mr. Hanisch consider and why did you consider that the stock had no value as of July 31, 1942, if you knew Mr. Hanisch was going to continue to operate the company and it would be successful?

A. Well, the Corporation—may I have that question?

(The question was read.)

Mr. Mackay: Read that question again, please.

(The question was read.)

The Witness: As of July 31, 1942, the company was in debt to Mr. Hanisch in the sum of some sixty thousand dollars, or thereabouts. I don't remember the month. If he were not in the position of advancing additional funds to the corporation and willing to do so, to pay the detail men to keep the thing going, we would have a lot of merchandise which nobody would want. It was Mr. Hanisch's willingness to continue to advance money to the corporation so that they could expand their operation, get the new customers——

Q. (By Mr. Maiden): Now, would you re-read my question?

(The question was read.)

Mr. Maiden: Now, I will ask Mr. Dunlap to answer. [321]

Q. (By Mr. Maiden): Now, you had just stated that the statement made to the Corporation Commissioner was based upon your knowledge that Mr. Hanisch was going to stay with the business and

(Testimony of Robert H. Dunlap.)

any business would be successful—that is, if Mr. Hanisch were connected with the business.

Now, I want you to answer my question.

A. I don't care to argue with you on this thing.

Q. Very well.

A. You say why did I consider—let's have it again.

(The question was re-read.)

The Witness: All right. I will answer not as to what Mr. Hanisch believed. I will answer as to why I believed it. I had seen the financial statement of the company. I had talked to Mr. Willis Brown and I knew that if they were making a profit, they were making a very small profit and that in the future the security probably would be valuable if Mr. Hanisch stayed with the company. I did not think that it had any value in dollars and cents except nominal at that time.

Q. (By Mr. Maiden): Why didn't you tell the Corporation Commissioner that in applying for this application to issue additional stock?

A. I did tell him that. I showed the financial statement to him and he came back and said, "I am not going to give you [322] a permit to merge these companies and issue new stock, because your earning statement shows the stock isn't worth anything."

Q. As a matter of fact, isn't it a fact that you issued a revised financial statement, showing a profit by the corporation?

(Testimony of Robert H. Dunlap.)

A. I have it right here. I would like to take a look at it.

The Court: Who is Mr. Willis Brown?

The Witness: Mr. Willis Brown was a certified public accountant who was then doing the office work of the company.

This statement of estimated profits of \$4,672.00, an estimated profit, that was Mr. Brown's estimate.

Mr. Mackay: What period?

The Witness: This was statement of August 3, 1942. I did not know at the time that he had not accrued interest and he had not accrued a lot of expenses.

Q. (By Mr. Maiden): Otherwise, in other words, you now claim that you were under a misapprehension of facts as to the financial condition of The Stuart Company when you gave assurance to the Corporation Commissioner that "you are further informed that none of the stockholders have any present intention of disposing of what they all believe to be a valuable security"? [323]

A. You say I was laboring under a misapprehension?

Q. It that what you are now claiming, that you were laboring under a misapprehension when you represented to the Corporation Commissioner that the stockholders believed this was a valuable security?

A. I was laboring under no misapprehension when I said they did not intend to sell it. They didn't. I was laboring under a misapprehension as

(Testimony of Robert H. Dunlap.)

to the earnings of the company in that immediately preceding period because, as a matter of fact, instead of making earnings, they made a loss.

Q. Now, Mr. Dunlap, you prepared the application that was filed with the Corporation Commissioner?

A. I did.

Q. And you set out certain allegations in that application?

A. You want to see it?

Q. Just answer the question.

A. Yes, I did.

Q. You were asking that the Corporation Commissioner waive the requirements that the additional stock be put in a scroll?

A. That is right.

Q. In order to obtain the freedom of the stock, you were trying to convince the Corporation Commissioner that The Stuart Company was at that time on a profitable basis; [324] isn't that right?

A. That is right.

Q. And you obtained or had an accountant obtain a financial statement which you submitted in support of your application, isn't that correct?

A. That's correct.

Q. Now, then, do you mean that you accepted this financial statement from this C.P.A. as being a true and accurate one without making any check or effort to verify it or anything?

A. Yes, certainly.

Q. Well, did you tell the Certified Public Accountant just what kind of a financial statement you wanted to show?

(Testimony of Robert H. Dunlap.)

A. I called him up and I said, "Can you get us a new statement?" Yes, I talked to him. I said, "What is the situation of the company; can you show a profit?"

He said, "No, I can show you a estimate that there is going to be an estimated profit." And that is what his statement shows, estimated profit.

Q. In other words, you called him up and asked him if he could show a profit? A. Right.

Q. And you were anxious to show to the Corporation Commissioner a profit regardless of whether or not, as a matter of fact, there had been a profit, is that right, Mr. Dunlap? [325]

A. That is not right. I did not intentionally make any misrepresentations to any court or public agency or anyone else, for that matter.

Q. Now, Mr. Dunlap, I call your attention to Respondent's Exhibit D, which is a letter written by Mr. Hanisch to the Corporation Commissioner in regard to this application, and in this letter Mr. Hanisch says, "Mr. Dunlap has informed me of his statement to you that the business of The Stuart Company is now on a profitable basis and has been for approximately 60 days last past. This is correct."

A. Well, it now develops that it now is not correct. That was based on this statement of Mr. Brown's.

Q. In other words, the situation has changed for time in making statements, is that correct?

A. Say that again.

(Testimony of Robert H. Dunlap.)

Q. The situation has changed with respect to time for making statements, is that correct?

Mr. Mackay: What do you mean?

Mr. Maiden: I will withdraw it.

The Witness: I don't understand.

Mr. Mackay: He will withdraw it. All right.

Q. (By Mr. Maiden): Now, Mr. Dunlap, as a matter of fact, on November 28, 1942, the only litigation then pending was the injunction suit brought against The Stuart Company by Vita-Food; [326] is that correct?

A. That is right, in which we about to appear and file an answer and a cross-complaint.

Q. Now, you added that on. That was not responsive. I want him to answer my questions and then he can make explanations. The fact remains that you did not file an answer to an injunction suit, isn't that correct? A. That is correct.

Q. Now, it further is a fact in this case that you had been apprised of filing of this injunction suit prior to November 28, 1941?

A. Two days before.

Q. I mean 1942. A. Two days before.

Q. And you had been served with the restraining order issued by the Superior Court prior to that time, is that correct?

A. I had not been served; the Stuart Company had.

Q. The Stuart Company had. Now then, what was the nature of that litigation? Will you tell the court?

(Testimony of Robert H. Dunlap.)

A. The nature of that litigation was to establish the allegation that The Stuart Company was bound to buy all of its products from the Vita-Food Corporation. The specific relief asked in that particular case was that The Stuart Company not be enjoined from selling any product purchased [327] from the other manufacturers under the trade name The Stuart Formula.

Q. Do you now admit to this Court that the only relief asked in this litigation was that The Stuart Company could be prohibited from using the trade name, the Stuart Formula, on any vitamin products which had not been manufactured by the Vita-Food?

A. I do not so admit. That is an equity case and in any equity case, the Court will render such decrees as the facts definitely merit on the [328] hearing.

Q. Within the scope of the prayer, is that correct?

A. No, sir, you are not limited in an equity case to the relief prayed for in California.

Q. Now, I want to know why it is that immediately after you were served with notice of that suit, that you contacted Mr. Wiseman and asked for a conference.

A. I did not contact him, he contacted me. I will tell you exactly what happened. Mr. Wiseman called me up and he said that he would like to have—"I placed some orders with these orders, and aren't

(Testimony of Robert H. Dunlap.)

they going to reply to the orders?" I called Mr. Wiseman and I said, "What about the orders that you have been paid for and have not yet delivered?"

We had actually, they had \$2300.00 of our money which we had paid them for orders theretofore placed. In the course of that conversation which was on the afternoon of the 27th of November, he said, "I will see you this evening and you can give me the check—" Wait a minute—"You can give me the payment for the balance and we will make delivery of the orders."

I met him at the Vista Del Rey Hotel that evening, and within five minutes after we met—6:00 o'clock, November 27th, he said, "Isn't there some basis of getting together and settling this?"

He contacted me. I did not contact him with reference to [329] the settlement.

Q. You would not have contacted him? Is that right?

A. Absolutely not. I was prepared to recast the complaint which has been marked for identification as Exhibit 16 as a cross-complaint.

Q. In other words, if Mr. Wiseman had not solicited an effort to settle the case, you would have gone ahead with the litigation that you say you had in mind bringing, is that correct?

A. Why certainly. Our settlement negotiations had broken down on the 22nd.

Q. You were going to go ahead, then, and file a complaint in court and undertake to rescind the

(Testimony of Robert H. Dunlap.)

contract of May 5, 1941, upon the ground of fraud and other allegations? A. That is right.

Q. I mean, had it not been for the fact that Mr. Wiseman suggested you ought to reach a settlement?

A. That is right, because we had been through the settlement conferences before. We thought we had arrived at a settlement on the afternoon of November 22nd. The next morning Mr. Wiseman called me up and said the deal was off.

Q. So then you now represent to the court that notwithstanding your prior testimony to the effect that the Stuart Company did not want to have to litigate that contract of May 5, 1941, because it would involve ruining the good name and business of the Stuart Company, you would not have sought to [330] reach any settlement short of litigation with Mr. Wiseman and the Vita-Food Corporation?

A. We had passed that bridge. I told you that we had made an effort to settle, and I saw Mr. Wiseman on the 18th, 20th and 22nd. The settlement negotiations had broken down. We had tried to settle. We didn't want to litigate up to that time. When we saw that the settlement negotiations had broken down, we were then prepared to go ahead.

Q. I am going to ask you this, Mr. Dunlap, and I want a frank, straight forward answer. Suppose you had filed an answer to this injunction suit in which you set up that you had the right to use the trade name, "The Stuart Formula," that you owned it as opposed to the Vita-Food Corporation

(Testimony of Robert H. Dunlap.)

and you had gone into the trial of a lawsuit involving the ownership of this formula, which is the subject matter of this suit, will you please tell the Court how the trial of a case of that nature would have involved proof of matters which would have ruined Stuart Company's business as you suggested in your direct examination?

A. We did not—we were not interested, except incidentally.

Q. I want you to answer that specific question, Mr. Dunlap.

A. You are assuming something that just is not true. You are assuming—— [331]

Mr. Mackay: Well, may we have the question?

The Court: Are you going to answer the question or argue with counsel?

Mr. Mackay: Will you read the question?

(The question was read.)

Mr. Mackay: If your Honor please, I would like to make this observation. He speaks about this suit. First he starts out talking about a complaint, and then this suit. Now, do you mean the present controversy we have here or what do you mean? It is so involved.

Mr. Maiden: You know very well what I am talking about, I am talking about this injunction suit filed by the Vita-Food Corporation against the Stuart Company.

Mr. Mackay: I am complaining then about the unclearness of the question, because as I understood it——

(Testimony of Robert H. Dunlap.)

The Court: Well, is it a hypothetical question or was the cause of action in the Vita-Food Company complaint devoted only to the question of the ownership of the trademark? Is your question hypothetical or is your question based upon some actual complaint?

Mr. Maiden: It is based upon the actual complaint and upon actual facts of the complaint.

The Court: What does the complaint set out to do? What exhibit is that?

Mr. Maiden: This is Exhibit No. 15, Petitioner's [332] Exhibit No. 15.

The Court: It seems that you can best explain your question by referring to Exhibit 15, is that true?

Mr. Maiden: Well, your Honor, it might involve reading the whole thing, and I don't want to take that time. The substance, the whole substance and the only substance of the suit is contained in the prayer for relief.

The Court: What is the prayer for relief?

Mr. Maiden: (Reading):

"Wherefore, plaintiff respectfully prays for judgment against said defendants, their officers, agents and employees, that they and each of them be permanently enjoined from using or attempting to use the trademark of plaintiff, 'The Stuart Formula' upon any product not manufactured by plaintiff, and not furnished to the said defendants and any of them by

(Testimony of Robert H. Dunlap.)

plaintiff, and from doing any of the acts or any of the things above mentioned."

The Court: The plaintiff there being the Vita-Food Corporation?

Mr. Maiden: The plaintiff being Vita-Food Corporation.

The Court: Your question is, if I can paraphrase it, Mr. Maiden, whether the defense of that kind of a cause and complaint would necessitate presenting any facts that [333] would be detrimental to the conduct of the business of the Stuart Company?

Mr. Maiden: That was my question, your Honor.

Mr. Mackay: If the question is so understood that way, I don't think I should have any objection to it.

The Court: Is that your question?

Mr. Maiden: That is my question stated succinctly and clearly.

The Witness: No, with this explanation: On the assumption that my answer would simply raise the question of our ownership.

Q. (By Mr. Maiden): Well, you stated that you wanted to keep down any litigation, any actual litigation. That would bring out the fact which you claim that the Stuart Company had been selling an inferior and a fraudulent product on the market, so why then would you have in answer to that suit alleged facts and things which would require proof of things which would destroy the business of the Stuart Company?

(Testimony of Robert H. Dunlap.)

A. Why would I do it?

Q. Yes.

A. Because I wanted to destroy the obligation of the Stuart Company to buy from Vita-Food, that is why, and I was prepared to shoot the works—if you will pardon the expression—to do just that. We had made an effort to [334] settle the case—not to settle the case, to settle the disputes between the parties and get a cancellation of the agreement. We had made an effort, and that had broken down.

Q. When did that effort commence?

A. On the 18th day—my first conference with Mr. Wiseman was on the 18th of November. I had my next one November 20th, and the final one November 22nd. We were unable to effect a cancellation of the agreement at that time. We were all through. We were faced with the situation of having to get out of the obligation to buy from the Vita-Food Company, and we were prepared to litigate that matter.

Q. Now, I want to know, Mr. Dunlap, why it is that you didn't actually file in court this so-called complaint that you state that you drafted prior to that time. Why didn't you actually file it?

A. Because two days after they—they jumped the gun on me and we settled our disputes.

Q. Now, will you tell me why it is that you settled that dispute within two days, and why you found it necessary to stay up all night long in order to complete that agreement?

A. I will be very glad to.

(Testimony of Robert H. Dunlap.)

Q. Do so.

A. On the afternoon of November 22nd, Mr. Wiseman and Mr. Hanisch agreed on a settlement. The next day Mr. Wiseman called up and said he wasn't going to go through [335] with it.

I said to Mr. Wiseman at the Hotel Vista Del Rey on the evening of November 6th, I said, "Look——"

Q. No. Wait a minute. I don't care——

A. November 27th, I said to him, "Look, Mr. Wiseman—Oscar," I said, "Look, Oscar, this time we are going to stay with it until we either settle or don't settle if it takes all night."

That is why we stayed with it, because I didn't want him to change his mind again.

Q. Didn't you think that if you held off a little while longer and you actually filed this suit and brought your arms out into the open, that maybe you might get a better settlement out of him?

A. No, I did not.

Q. Thank you, that is the best answer I have had this morning.

Mr. Mackay: You don't like his answer.

Q. (By Mr. Maiden): Now, Mr. Dunlap, at the time of the agreement of November 28th, 1942, cancellation notices had been served upon both of the parties, that is, a cancellation notice had been served on the Stuart Company revoking their exclusive right, and the Stuart Company had acknowledged receipt of that notice and had stated that they considered it cancelled [336] for all purposes, and

(Testimony of Robert H. Dunlap.)

that they would not recognize an effort to reinstate the contract? A. That is right.

Q. Now, why didn't you wait until the 60 days expired which would put those cancellation notices into effect to find out whether or not Vita-Food Corporation intended to try to hold to a one-sided contract before you settled the case?

A. For this reason: This complaint, Exhibit 15, alleges that we still have to buy our product from the Vita-Food Corporation. They——

Q. It says——

Mr. Mackay: Let him answer.

The Witness: I want to read it to you—why didn't I wait for the 60 days? Because the Vita-Food Corporation contended that the contract was still in effect in this very litigation.

The Court: Well now, this whole trouble is about chronology. I think that would help a little bit. What is the date of the notice?

The Witness: October 8, 1942.

The Court: From Vita-Food?

The Witness: October 8th.

The Court: What is the date of the filing of their complaint? [337]

The Witness: November 25, 1942. That is before the 60 days had expired.

The Court: 60 days from October 8th would have been December 8th or 9th?

The Witness: That is correct.

The Court: So Vita-Food filed a complaint before the 60 days had expired?

(Testimony of Robert H. Dunlap.)

The Witness: Exactly.

The Court: Is that what you want to say?

The Witness: And this: In that complaint they said that the contract was still in effect.

Q. (By Mr. Maiden): Now, I want you to show me in this petition, and I want to do it if you have to read every word of it, show me in here in this injunction contention wherein they actually allege that you have to buy—that is, where the Stuart Company had to buy all of its products from Vita-Food.

A. I will be happy to. Page 5 of Exhibit 15, line 14.

The Court: Read it.

The Witness: (Reading):

“First Parties shall handle no other products than those manufactured or produced by Second Party, and shall be the sole distributor of all products manufactured or produced by Second Party, except as herein otherwise [338] provided.”

The Court: What is the whole text, then? Are they quoting from the agreement?

The Witness: Quoting from the contract, that is correct.

The Court: That isn't very clear. Why do you think that quoting from the contract means that they were asking the Court to sort of mandamus you to continue to operate under the contract?

(Testimony of Robert H. Dunlap.)

The Witness: Your Honor, this is an injunction case.

The Court: Well, I know it is an injunction case. An injunction case would be the opposite in the way of a mandamus proceeding.

The Witness: Exactly, but in an injunction proceeding it is true that at the time of the filing of the complaint, the only remedy they inserted was that we could not use the trademark, "The Stuart Formula," but in the California equity practice, the Court will mould its decree to cover the relief to award the relief which is appropriate under the evidence adduced.

The Court: Yes, but then up to that time Vita-Food Corporation had not asked the Court in any bill of complaint to order the Stuart Company to continue to operate under the contract, under the provision that the Stuart Company would have to buy all of the things it sold from Vita-Food, had it? [339]

The Witness: That is correct, your Honor.

Q. (By Mr. Maiden): In other words, the suit did not undertake to have the Court restrain the Stuart Company from purchasing vitamin products from other sources, did it?

A. That is correct.

Q. Now, then, after this injunction suit was brought against you and you saw the type of relief that it asked for, and that it didn't undertake to restrain the Stuart Company from purchasing vitamins from any other source, why did you enter into

(Testimony of Robert H. Dunlap.)

this settlement agreement until you found out whether or not the Stuart Company was going to actually take any such action as that against you?

A. You mean the Stuart Company or the Vita-Food Company?

Q. That the Vita-Food Company would take against the Stuart Company.

A. Well, I think, Mr. Maiden, that if you will read this Exhibit 15, you will find that they were—it was in this contract, in this Exhibit 15—the allegations which clearly indicated to me that they did intend to hold us to our contract.

Q. They weren't doing it in the suit they filed, they were asking for only one relief.

A. In the prayer—— [340]

Q. Just a minute, and that was to enjoin you from using the trademark "The Stuart Formula" on vitamin products which you had not purchased from Vita-Food Corporation.

A. In the prayer, that is correct.

Q. Now, wouldn't that indicate to you that the Vita-Food Corporation had no intention or undertaking to try to force you to purchase all of your products from them? A. It did not.

Q. It didn't carry that connotation in the relief?

A. It did not. In fact, quite the contrary.

Q. Well, now——

The Court: Mr. Mackay, do you want to interpose an objection?

Mr. Mackay: I don't want to interrupt, if your Honor please, but if your Honor will read the ex-

(Testimony of Robert H. Dunlap.)

hibit, the letter of October 8, 1942, which is attached as part of the complaint, that specifically says that they want to cancel only part of the contract, but the rest to remain in effect. It seems to me that if you will read the complaint, the whole thing there together, that you can see what they are after there, and it is part of the complaint, and I think the witness' attention should be directed to that.

Mr. Maiden: Now, if the Court please, regardless of what they said in the letter of cancellation of October 8, 1942, when they came to file their litigation in court [341] with The Stuart Company, there is no effort made to enforce that contract. The only thing is to enjoin these people from pirating their trade name.

Mr. Mackay: Mr. Maiden, isn't that letter there which attempts to cancel only part of the contract? Isn't that made a part of the complaint? That is what I am trying to say.

Mr. Maiden: That is true, the letter of October 8th——

Mr. Mackay: Why can't we look at the whole complaint?

Mr. Maiden: I don't think we need to look any further than the four corners of the allegation contained in the complaint, and the specific relief asked for.

Mr. Mackay: Well, if you want to ignore all the exhibits and the equity rules in California, it is all right with me. [342]

Q. (By Mr. Maiden): Now, Mr. Dunlap, did

(Testimony of Robert H. Dunlap.)

you think you had a good cause of action against the Vita-Food Corporation?

A. I thought I had a fine—I had three fine causes of action against the company.

Q. Will you tell us of those causes of action?

A. May I look at Exhibit 16 for identification? I think counsel has a copy there.

Mr. Mackay: Yes.

The Witness: The first cause of action was for fraud in inducing the execution of the contract; the second cause of action was for failure of consideration, and the third cause of action was for a declaration of rights and duties under our declaratory judgment statute.

Now, do you want me to go through and explain what that cause of action was?

Q. (By Mr. Maiden): No, I don't. That is sufficient.

Now, when did you become convinced that you had this splendid cause of action against Vita-Food Corporation?

A. The 10th of October, 1942.

Q. The 10th of October, 1942?

A. Right. Do you want to know why I remember that date?

Q. Well, you can if you want to, I have got no objection. [343]

A. I mean, I don't want to answer it unless——

Q. Well, I mean, if it has some particular bearing on the subject.

A. It is the day that I met Mr. Strate, and Mr.

(Testimony of Robert H. Dunlap.)

Strate explained to me that there just wasn't any such thing as a method of compounding in a molasses base oil-soluble vitamins A and B with water-soluble members of the B-complex, and also that the price that we were paying to Mr. Lewis was too high by more than 30 cents a bottle.

The Court: Who is Mr. Strate?

The Witness: Mr. Strate is vice-president and sales manager of Strong-Cobb & Company, who had called on Mr. Hanisch.

Q. (By Mr. Maiden): Now, then, upon the basis of the information that this alleged man told you——

A. This what?

Q. ——you reached an opinion, a legal opinion as a lawyer, that you had an excellent cause of action against the Vita-Food Corporation and that you could successfully set aside this contract of May 5, 1941, is that right?

A. Right.

Q. You were cocksure about that, Mr. Dunlap?

A. Yes, I was.

Q. But the fact still remains that you never filed any such suit? [344]

A. That is right.

Q. The fact remains that you—that the Stuart Company paid the Vita-Food Corporation \$197,700.00 to get out of the contract, according to your interpretation, is that right?

A. Not according to my interpretation, that is what they paid us for it. I know, I was one of the parties.

Q. You were one of the parties. Now, Mr. Dunlap, you weren't interested in obtaining title to

(Testimony of Robert H. Dunlap.)

“The Stuart Formula,” I believe. That has been the tenor of the testimony throughout the case, is that right? A. We already owned it.

Q. Oh, you already owned it?

A. That is right.

Q. How can you make that statement in good faith to this Court, Mr. Dunlap, when you set forth specifically in the agreement of May 5, 1941, that the Vita-Food Corporation did own and should own this trade name?

A. I can make that statement in perfectly good faith, and I don't want you challenging my good faith, Mr. Maiden. If I sign a contract with you in which I say that you are my father, that doesn't make you my father, and that is exactly the kind of a statement that Exhibit 8 is. In other words, it was entirely a void provision in the agreement, it was of no effect whatsoever. You cannot transfer or create ownership of a trade-mark in that [345] way.

Q. Now, for purposes of this case, I am going to ask you if you have ever seen this document here which is headed, “State of California, Department of State,” in which it is set forth that this trade-mark has been registered in the name of and is the property of Vita-Food Corporation, dated the 23rd day of June, 1942. A. Certainly.

Q. I will ask you if that is prima facie evidence of ownership in Vita-Food Corporation under California law? A. It is.

The Court: May I look at that? Is that an exhibit attached to the complaint?

(Testimony of Robert H. Dunlap.)

Mr. Maiden: It is attached to the complaint, No. 15.

The Court: Exhibit No. 15?

Mr. Maiden: Mr. Mackay, you will stipulate with me that this is a correct copy of the certificate?

Mr. Mackay: Yes, indeed. It is in evidence, and I wouldn't let it go in unless I knew it was good.

The Court: What is this, Mr. Dunlap, this exhibit? It is a certificate from the Secretary of State of California, and purports to certify that Vita-Food Corporation made a claim for a trade-mark?

The Witness: That is right. Under California law, your Honor, we have a provision for registering a trade-mark with the Secretary of State. [346]

The Court: Is that something rather unique to the State of California?

The Witness: No, it isn't. We have a little bit more comprehensive provision than many States. Some States don't have any provision for the registration of a trade-mark.

The Court: Well, you see, we get into these special fields, all of us. Let me ask you this question for my general information: Where does the area of state law regulating the use of a trade-mark end and where does the area of federal regulation begin?

The Witness: When you start shipping in interstate commerce it is federal.

The Court: Oh, if you are disposing of your product solely in intrastate commerce, you are con-

(Testimony of Robert H. Dunlap.)

trolled by the state law, and the States have their own copyright and trade-mark statutes, do they?

The Witness: Not copyright, usually.

The Court: No copyright?

The Witness: Not copyright, usually.

The Court: But trade-mark?

The Witness: A minority of the States—I mean, I wouldn't want to say whether it is a minority or a majority that do have trade-mark laws which are applicable to the States.

Q. (By Mr. Maiden): Now, Mr. Dunlap, I call your attention to a document [347] in Exhibit 15, which purports to be a photostatic copy of a certificate of registration issued by the Commissioner of Patents of the United States of America, which states that, "Upon due examination, it appearing that the said applicant is entitled to have his trade-mark registered under the Act of May 19, 1920, the said trade-mark has been duly registered this day in the United States Patent Office to the Vita-Food Corporation, its successors or assigns."

That is dated the 8th day of September, 1942.

A. Right.

Q. Now, would you say that that is evidence, prima facie evidence, of the Vita-Food's ownership of this trade-mark?

A. Prima facie evidence, yes.

Q. Now, Mr. Dunlap, how much did The Stuart Company pay Vita-Food for their title to this trade-mark?

A. Nothing.

Q. Nothing. That didn't involve any of the con-

(Testimony of Robert H. Dunlap.)

sideration in the agreement of November 28, 1942?

A. No, we were interested in getting freedom from the provisions of that contract. The trade-mark was an incidental something.

Q. Now, I believe you stated something about an abandonment clause being put in there at the suggestion of Mr. Wiseman? A. Yes, I did.

Q. Who stated that the Stuart Company was going to [348] abandon that formula?

A. He was afraid we might. We had not stated that we were going to. I will say this: We had told him that we were prepared to use a new name.

Q. In other words, that you were going to abandon the "Stuart Formula" name, that you were contemplating the adoption of a new name?

A. That is correct. We told him we had already started the art work on a new name.

Q. Now, did you show him the new art work that you had commenced on the new name?

A. I said we had started on it. No, we didn't have that with us, they were just rough drawings at the time. I don't know whether any actual drawings had been made, but orders had been placed, as I recall it.

Q. But the fact is that The Stuart Company did not abandon that trade-mark, isn't that correct?

A. That is correct, it did not abandon it; no.

Q. And the fact is that The Stuart Company continued to and does to this day use that trade-mark? A. That is right.

Q. Now, Mr. Dunlap, the fact is that you knew

(Testimony of Robert H. Dunlap.)

at the time of the conferences which culminated in the November 21, 1942, agreement, that you had no intention of either abandoning the "Stuart Formula" name—— [349]

A. The fact is quite the contrary.

Q. Well, why didn't you abandon it, Mr. Dunlap?

A. I am one of the directors of the company, and the decision to do that—that end of the thing, I am guided by what Mr. Hanisch decides.

Q. In other words, you were for abandoning it, is that correct?

A. Why, I didn't care one way or the other.

Q. If you had been selling such a fraudulent, inferior article on the market for nearly two years under the name, "The Stuart Formula," didn't it occur to you that possibly the name, "The Stuart Formula," would be detrimental to your business if you continued to use it?

A. Very definitely.

Q. Well, why did you continue to use it, then?

A. We had a lot of labels on hand, we had a lot of the stuff that we had paid for. After all, you don't throw away \$50,000.00 or \$60,000.00 if there is a chance to get it back.

Q. Well, all right, then. When you used up the supply on hand, why did you order some more?

A. Those decisions were made by Mr. Hanisch.

Q. Now, since that agreement of November 28, 1942, sets out that the parties desire to settle this litigation, which refers to this injunction suit, how

(Testimony of Robert H. Dunlap.)

much of the consideration was made for the settlement of that injunction suit? [350]

A. I didn't set down and pay—and add any figures. We were settling the whole matter, we were getting rid of the litigation, the expense of that. We were getting out of the contract. We were settling all our disputes. I didn't count them.

Q. In other words, you tell the Court that some part of that consideration was for the purpose of settling this injunction suit, is that correct?

A. Yes.

Q. But you are unable to tell the Court how much of it was in consideration for that?

A. I would say that, yes. I figured that it would take \$5,000.00 to \$6,000.00 to try the case.

Q. In other words, you were giving the settlement of the litigation just a nuisance value in that consideration, is that right?

A. Well, it would be a hard-fought lawsuit. I would say \$5,000.00 to \$6,000.00. I think that was a little more than nuisance value.

Q. So that, then, with \$5,000.00 or \$6,000.00 taken off of \$197,700.00, we have got about \$192,000.00 that you were paying solely and absolutely for the cancellation of the May 5th contract, is that right?

A. That is right. May I state how I arrived at that statement? [351]

Q. You may if you wish to, Mr. Dunlap.

A. If we had been purchasing from the William T. Thompson Company from the beginning of our

(Testimony of Robert H. Dunlap.)

operation in The Stuart Company, we would have made \$99,000.00 profit——

Q. Now, I don't want an argument, Mr. Dunlap——

A. Up to the 28th of November, 1942. We knew that, and we were willing to pay the amount that we could make in two years to get out of the obligation to buy from Vita-Food.

Q. Now, you first stated that you didn't know what part of that consideration applied to the injunction suit, because you were settling over-all differences? A. Right.

Q. How did it happen to finally occur to you that possibly \$5,000.00 or \$6,000.00 did relate to the settlement of the injunction suit?

A. As a result of your question here today.

Q. Did the thought creep into your mind that maybe any admission that you made with respect to this consideration being applicable to the settlement of this injunction suit would not be a proper expense deduction but would be considered as a cost of obtaining a capital asset; the trade-mark?

A. May I have that again, please?

The Court: Read the question.

(The question was read.)

The Witness: As I understand it, Mr. Maiden, payments [352] in settlement of litigation are ordinary expenses.

Q. (By Mr. Maiden): But payments made to quiet or perfect title in a trade-mark would be a different thing, wouldn't they, Mr. Dunlap?

(Testimony of Robert H. Dunlap.)

A. That is perfectly true, that is perfectly true.

Q. They would not be deductible expenses?

A. That is correct.

Q. Now, Mr. Dunlap, I am just wondering whether or not, as a fact, you were tax-conscious of that transaction to The Stuart Company in the acquiring of this trade-mark in the agreement of November 28, 1942.

Mr. Mackay: If your Honor please, I will admit that this is a smart lawyer, Mr. Hanisch is a smart businessman, and that they were conscious of the Internal Revenue laws and are presumed to know them, and they did know something about income tax.

Mr. Maiden: Well, I don't accept the stipulation. I want the answer from the witness.

Mr. Mackay: I am trying to help out and save time.

Mr. Maiden: Well, I appreciate that, Mr. Mackay.

The Witness: Yes, I was conscious of that.

Q. (By Mr. Maiden): And I will ask you if you weren't trying to so write that agreement of November 28, 1942, to establish for the [353] Stuart Company, in the event of questioning by the Government, that The Stuart Company was simply paying some money to cancel an onerous contract and was not actually paying any money for the acquisition of a trade-mark?

Mr. Mackay: If your Honor please, I think he is going far afield. This Court has got to determine

(Testimony of Robert H. Dunlap.)

from the facts here whether this is a capital expenditure or whether it is a deductible expense.

Mr. Maiden: Well, the tax motive reflects upon those things. What we are concerned with here is the bona fides of this contract. We are not bound——

Mr. Mackay: Are you questioning that the contract is not bona fide?

Mr. Maiden: No, I am saying that we are concerned here not with the nomenclature that the parties have used, but we are concerned with the substance.

Mr. Mackay: Mr. Maiden, do you mean to tell me that the Commissioner of Internal Revenue, who has based his assessment on this contract which he speaks about as an agreement for the settlement of litigation and cancellation of a contract, is now trying to tell this Court that that contract means something other than it says?

Mr. Maiden: I am trying to say that the true substance of that contract was the acquisition of a trade-mark and that the entire consideration was in payment solely for [354] that trade-mark, and that all these other contingents are spurious.

Mr. Mackay: Well, if you are contending, if your Honor please, that we could end it some other way so that Uncle Sam can grab more dollars, I will admit that we could have done it. We are up against this situation where there is a contract between the parties, and for the first time they say that it didn't mean what it says. I say that the question is incom-

(Testimony of Robert H. Dunlap.)

petent, irrelevant, and immaterial, and taking up too much time of the Court.

The Court: Well, the objection is overruled. You may answer the question.

Read the question and let Mr. Dunlap answer it.

(The question was read.)

The Witness: I will answer your question "Yes," with this qualification: I was writing up the actual agreement that we actually arrived at. We were not acquiring a capital asset, and I drew it in that way because we weren't acquiring it.

Q. (By Mr. Maiden): That is, of course, in your opinion? A. That was my intention.

Q. Of course, you have no interest in the outcome of this lawsuit, Mr. Dunlap, is that correct?

A. I wouldn't say that at all. I am interested, of [355] course, in the success of my client.

Mr. Maiden: If your Honor please, I would like to ask if we could recess for lunch at this time. I believe I can save the Court's time if we could have a recess to let me go over my notes, and I will just have a few questions to ask Mr. Dunlap.

The Court: I thought perhaps you would be about finished with your cross-examination and that we would recess for lunch after that.

We will recess now until 2:10.

(Whereupon, at 12:40 p.m., a recess was taken until 2:10 p.m. of the same day.) [356]

Afternoon Session—2:00 P.M.

The Court: You may proceed.

Whereupon,

ROBERT H. DUNLAP

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Maiden:

Q. Mr. Dunlap, I hand you here a letter dated April 15, 1943, addressed to Mr. Oscar Wiseman, and ask you if you will identify that as a letter written by you.

A. Yes, that is my signature. I sent it.

Mr. Mackay: May I see it?

Mr. Maiden: Yes.

The Witness: May I take another look at it? I want to see the P.S. on it. All right.

Mr. Maiden: I would like to offer this in evidence as Respondent's exhibit next in order.

Mr. Mackay: No objection.

Mr. Maiden: I might call the Court's attention to the contents of this exhibit. It is just one little paragraph. This is addressed to Mr. Wiseman on April 15, 1943, from Mr. Dunlap.

It said: [357]

(Testimony of Robert H. Dunlap.)

“Pursuant to the provisions of paragraph second of the Agreement between Vita-Food Corporation and the Stuart Company dated November 28, 1942, I am directed to request the execution of the enclosed Assignments of Trade-Marks.

“Extra copies of this are enclosed for your files.

“Your early attention to this request will be appreciated.”

There is a little postscript:

“Please let us have two executed copies.”

The Clerk: That will be marked Exhibit M.

The Court: Is there any objection?

(No response.)

The Court: Without objection, the letter is received as Exhibit M.

(The document above referred to was received in evidence and marked Respondent's Exhibit M.)

Q. (By Mr. Maiden): Mr. Dunlap, for the purposes of possibly refreshing your recollection, I will ask you if you will look at this and tell me whether or not you received assignments of these registration certificates from The Vita-Food Corporation on or about November 30, 1942.

A. I did not. The letter was dated April 15, 1943. [358] We waited five months to ask for an

(Testimony of Robert H. Dunlap.)

assignment. What you have shown me is a copy of the receipt for the original registration, not the assignment.

Q. Then, on November 30, 1942, you acknowledged receipt of the following documents:

“1. Trade-mark registration to The Stuart Formula, No. 397611, dated September 8, 1942, issued by the United States Commissioner of Patents.”

A. Right.

Q. “2. Certificate of registration issued by the California Secretary of State to the trade-mark ‘The Stuart Formula’ under date of June 23, 1942, numbered 25736.”

A. I mean, those are the documents of which photostats form a part of Exhibit 15, but so that there will be no misunderstanding between you and me, counsel, we waited until 5-15-43, five months later, before we asked for an assignment.

Q. But on November 30, 1942, the originals of these documents were turned over to you and you acknowledged receipt of them?

A. That is right.

Mr. Maiden: I would like to ask this in evidence as Respondent’s exhibit next in order.

Mr. Mackay: No objection. [359]

The Court: It will be received in evidence as Respondent’s Exhibit N.

(Testimony of Robert H. Dunlap.)

(The document above referred to was received in evidence and marked Respondent's Exhibit N.)

Q. (By Mr. Maiden): Now, in your letter of April 15, 1943, I believe it is indicated that you enclosed some assignments of the trade-marks, that is, documents for the assignment of the trade-mark?

A. That is right. As I remember it—pardon me, you hadn't asked the question.

Q. I will ask you if you will look at this document I hand to you and see if that is a copy of the assignment as drawn up by you and enclosed with your letter of April 15, 1943.

A. I believe it to be the one. The reason I am hesitant about that one, Mr. Maiden, is this: I think there were two or perhaps three forms submitted, and modifications were requested by Mr. Wiseman. Whether this was the one that went with the first letter, I don't know. I assume that it was.

Q. This was not the assignment that was actually executed by The Vita-Food Corporation, was it?

A. I don't think so. I may be in error on that. It may have been. In any event, counsel, I did prepare that [360] particular instrument at some time. Whether that was the one that was finally signed, I don't know.

Q. Mr. Dunlap, I hand you here what purports to be a copy of an "Assignment of Trade-Mark" by The Vita-Food Corporation per Oscar Wiseman,

(Testimony of Robert H. Dunlap.)

and it appears to be sworn to on the 24th day of June, 1943, by Mr. Wiseman before a notary public. Would you be kind enough to read that over and see if that is the assignment you got from Vita-Food Corporation?

A. Yes, I am sure that this is the only one. My recollection is that there was one which was used for transmittal to Washington and another one which was used for transmittal to the Secretary of State. I may be in error on that. This is one of the assignments. Whether this is the only one, I don't know.

Q. Do you have the other assignments, if there are any that were actually executed by Vita-Food Corporation?

A. No, I don't. I looked for them, and I can't find them. I find in my files several revisions—the reason for my answer is this: I looked carefully through the files to be prepared to present the actual document that was executed. I can't find it. Where it is, I don't know.

Mr. Maiden: I would now like to offer in evidence this Assignment as Respondent's exhibit next in order.

Mr. Mackay: No objection.

The Clerk: Exhibit O. [361]

The Court: It is received as Exhibit O.

(The document above referred to was received in evidence and marked Respondent's Exhibit O.)

(Testimony of Robert H. Dunlap.)

Mr. Maiden: I would like to have marked for identification at this time as Respondent's Exhibit P, the unexecuted copy of "Assignment" which Mr. Dunlap sent to The Vita-Food Corporation in his letter of April 15, 1943.

The Court: It will be marked for identification as Exhibit P.

(The document above referred to was marked Respondent's Exhibit P for identification.)

The Witness: If you want me to, Mr. Maiden, I will be glad to explain the different language if you think it is material.

Mr. Mackay: I think the witness is entitled to explain his answer.

Mr. Maiden: I am sure, Mr. Mackay, you will bring that out. I want to move along if I may.

Q. (By Mr. Maiden): Now, Mr. Dunlap, did the contract of May 5, 1941, provide any penalty against The Stuart Company for non-performance of the contract, that is, for failure to purchase any of The Vita-Food Corporation's products?

A. Certainly.

Q. What was the penalty? [362]

A. In so many words in the contract, no.

Q. Well, would we find a penalty unless we found it within the four corners of the contract?

A. When you speak of penalty, are you using that technically or in the sense of liability?

Q. In the sense of liability.

A. It was my opinion that The Stuart Company

(Testimony of Robert H. Dunlap.)

was liable to Vita-Food Corporation for failure to purchase the quota requirement, and if they did not purchase the quota requirement in any one month, it was my belief and opinion that The Stuart Company was liable to Vita-Food Corporation for the difference between the amounts actually purchased and the amounts which they agreed to purchase.

Q. Will you please point out in the contract any such provision that would lead you to form such an opinion? A. Paragraph 6.

Q. Will you read paragraph 6 and point out the part of paragraph 6 that would make The Stuart Company liable for any damages upon its failure to purchase the concentrate from Vita-Food Corporation?

A. Pardon me, I want to change my answer. I am in error as far as the quotas are concerned. The corporation could not buy from anyone else.

Q. But the corporation was not bound to buy anything from Vita-Food Corporation? [363]

A. That is correct. If The Stuart Company stayed in business and sold vitamin concentrates, it had to buy all that it sold from The Vita-Food Corporation.

Q. Now, then, Mr. Dunlap, if you were so interested in getting out of this contract and if you had no interest in this trade-mark and would have paid nothing for it, why didn't you advise your client to simply not purchase any concentrates under this contract and thereby force Vita-Food

(Testimony of Robert H. Dunlap.)

Corporation to cancel the business arrangements altogether?

A. That question cannot be answered. If you mean by that, why didn't I advise The Stuart Company to go out of business, obviously that is unrealistic. They wanted to stay in business, but they couldn't—as long as they stayed in business they had to buy from Vita-Food. They couldn't buy from anyone else. Now, you say, force them to cancel. If they didn't buy from Vita-Food and bought from someone else, they would have immediately subjected themselves to liability from The Vita-Food Corporation, because they agreed to purchase only from Vita-Food.

Now, what you are suggesting, as I understand it, is that they could have gotten out of all of the obligations and duties under the contract simply by going out of business. Of course they could, that is true.

Q. Well, I am just wondering if it wouldn't have been cheaper to have taken that step and then organized a new [364] business than it was to pay \$197,700.00.

A. We figured it would cost us \$25,000.00 to start a new business.

Q. Did it cost you \$25,000.00 to start The Stuart Company off at the beginning?

A. It cost about—before they had any returns there was more than \$60,000.00 invested. I haven't fully answered that question, Mr. Maiden.

Q. Take your time.

(Testimony of Robert H. Dunlap.)

A. I would like to amplify my answer by saying this to you: The continuity of a business of this character is quite important. When you once build your detail organization, you have got to keep the thing rolling. Now, to disincorporate this company and start a new company would have not only been embarrassing to the company, but Mr. Hanisch was bound to continue to buy from The Vita-Food Corporation because the organization of a new company, in starting out fresh, would have been subject to the provisions of the contract of May 5, 1941, because you will notice that that contract binds anyone who succeeds to the business of The Stuart Company. Now, if we started a new company—if Mr. Hanisch started a new company, he would have succeeded to the business. He would have been charged with trying to succeed to the business of The Stuart Company and seeking to evade the provisions of the agreement. [365]

I would like to add this, also: You will notice by reference to Exhibit 15 that The Vita-Food Corporation took the position that The Stuart Company was Mr. Arthur Hanisch's alter ego and he was personally bound by the terms of the May—I am not going to say bound by the terms of the May 5th agreement, but whatever duties The Stuart Company had, it was the position of The Vita-Food Corporation that Mr. Hanisch was also bound.

Q. Is that provision expressed in the contract of May 5, 1941, that Mr. Hanisch is bound?

A. Yes, sir. This contract—paragraph 24—

(Testimony of Robert H. Dunlap.)

“This contract shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto, and specifically, and without limiting the generality of the foregoing, this contract shall be binding upon any individual or partnership who succeeds to the business of either party hereto.”

What you are suggesting is that we should drop The Stuart Company, start a new concern, and do the same sort of thing, and that would have been succeeding to the business of The Stuart Company.

Q. That is according to your interpretation?

A. Exactly—according to the interpretation of The Vita-Food Company.

Q. According to your interpretation? [366]

Mr. Mackay: He has already answered.

Q. (By Mr. Maiden): Now, there is nothing in this contract that binds anybody except The Stuart Company to purchase materials from The Vita-Food Corporation, is there?

A. In paragraph 24, yes.

Q. Well, I am not talking about paragraph 24 now. I am asking you if there is any provision in this agreement of May 5, 1941, that provides that Mr. Hanisch is bound to buy products from Vita-Food Corporation.

A. Mr. Hanisch personally eo nomine? You mean by his specific designation “Arthur Hanisch” must buy from Vita-Food Corporation?

Q. Yes.

(Testimony of Robert H. Dunlap.)

A. No, not as long as The Stuart Company is; The Stuart Company makes the purchases.

Q. Now, we will say The Stuart Company goes out of business, dissolves and goes out of business, and you form the X Company with a different setup entirely, and for the purpose of carrying on the business of selling vitamins. Do you mean to tell this court that this contract of May 5, 1941, could have been invoked against that new corporation and that that new corporation would have been forced to buy all of its vitamin products from Vita-Food Corporation?

A. Now you tell me a different setup entirely. Will [367] you tell me what you mean by that, and I will answer your question.

Q. You know what I mean by it.

Mr. Mackay: The witness is entitled to understand the question.

Mr. Maiden: If he doesn't want to answer the question——

Mr. Mackay: He is trying to understand the question.

Mr. Maiden: Read the question.

(The question was read.)

Mr. Mackay: I submit, if your Honor please, that the witness is entitled to a clear question. It is a different setup entirely. What is meant by "with a different setup"?

Mr. Maiden: All right, I will eliminate "different setup."

The Court: The objection is sustained.

(Testimony of Robert H. Dunlap.)

Q. (By Mr. Maiden): Now, then, Mr. Dunlap, if you had dissolved The Stuart Company and formed a new corporation authorized to do business as a distributor or manufacturer of vitamin products, could this contract of May 5, 1941, have been invoked against the new corporation so as to prohibit this new corporation from buying any vitamin products except from Vita-Food [368] Corporation?

A. If Mr. Hanisch was not connected with the corporation, the assumed new corporation would, of course, not be bound. If Mr. Hanisch was connected with the corporation, I am quite certain that The Vita-Food Corporation would have sought to hold Mr. Hanisch personally liable and bound by the agreement of May 5, 1941.

Q. Now, Mr. Dunlap, what kind of a notice was that you served on The Vita-Food Corporation, I believe, on November 23, 1942? It is in evidence, but——

A. Notice of rescission of contract.

Q. Notice of rescission of contract?

A. That is a special California procedure. If you want to cancel a contract, you must give notice of rescission and you must offer to return everything you have received of value under the contract which you propose to cancel, provided the other party does likewise.

Q. Yes. Was that necessary before you could file a suit for that purpose?

A. It was, it was.

(Testimony of Robert H. Dunlap.)

Q. Now, Mr. Dunlap, I will ask you if it isn't a fact in this case that subsequent to October 12, 1942, which is the date of the acknowledgment by The Stuart Company of Vita-Food's cancellation, The Stuart Company didn't place two orders with The Vita-Food Corporation, being order [369] numbers 36 and 37, for purchases of the vitamin concentrate.

A. I think not only those two orders, but I think there were more than that.

Q. You think there were more than that?

A. I think there were more than that, that is correct.

Q. I believe you stated previously that you knew as of October 12, 1942, that the vitamin concentrate that the Vita-Foods had been furnishing you under the contract was an inferior product and was really a fraud. Is that the sense of your testimony on direct or cross-examination, if you recall?

Mr. Mackay: Just a moment.

Mr. Maiden: Just a second, I want to get my question in.

The Court: All right. He is through, Mr. Mackay. Have you any objection?

Mr. Mackay: If your Honor please, I think he is stating something that isn't in the record.

Mr. Maiden: Well, I am asking—

Mr. Mackay: Wait a minute, let me finish.

Mr. Maiden: Excuse me, Mr. Mackay.

Mr. Mackay: We are not claiming that the prod-

(Testimony of Robert H. Dunlap.)

uct itself was a fraud. We said it was not stable and not good, and all that, but the fraud the whole record shows relates to the representations that were made. Now, counsel is [370] inferring in the record that we are saying that we were putting out a fraudulent product. We admit, and our testimony shows, that we weren't getting the kind of product we expected to get, and we were trying to improve it, but we don't admit for one moment that The Stuart Company was putting out a fraudulent product, except with respect to where it says all the natural product, there.

The Court: Is that an objection to the question?

Mr. Mackay: Yes, I object.

The Court: The objection is sustained.

Mr. Maiden: If the Court please, I don't understand the basis of the Court's ruling. Could the question be reread?

The Court: The question is too broad, and is a question that supposes that there is testimony in the record which counsel for the Petitioner has stated is not in the record, and I think that he is correct, so I think you had better reframe your question. The reporter will read the question back to you if you wish.

Mr. Maiden: I don't care to pursue it, if the Court please.

Q. (By Mr. Maiden): Mr. Dunlap, referring again to the contract of May 5, 1941, and specifically to paragraph 24, to which you referred, I will ask you if it isn't a fact that paragraph 24 [371] would,

(Testimony of Robert H. Dunlap.)

of course, have been inoperative and have no force and effect in the event this contract had been canceled. A. In its entirety?

Q. Yes. A. That is right.

Q. I believe, under this agreement of November 28, 1942, that The Stuart Company completed its purchases of orders Nos. 35 and 37, is that correct, Mr. Dunlap, as you recall?

A. Yes, that is true, and I think, Mr. Maiden—although I am not certain—I think subsequent orders were placed. I think there may be one or two. I may be wrong.

Q. That product was sold by The Stuart Company? A. Oh, yes.

Mr. Maiden: I believe that is all, if the Court please.

The Court: Now, let me ask you one question about your exhibits. Exhibit M is the letter forwarding drafts of assignments of trade-marks; Exhibit O is a copy of "Assignment" and is executed by Mr. Wiseman; Exhibit P is a draft that is not executed. Now, just tell me again what was the reason for that?

The Witness: Exhibit P, your Honor—the reason for that?

The Court: No, what were you going to [372] say?

The Witness: Exhibit P, I believe to have been the document that was transmitted with the letter of April 15th, which is Exhibit M. The language in Exhibit P was not satisfactory to The Vita-Food

(Testimony of Robert H. Dunlap.)

Corporation, and therefore Exhibit O was prepared. In other words, Exhibit O was prepared after Exhibit P, and your Honor will notice that the second paragraph of Exhibit O is practically a direct quote from some of the provisions of Exhibit 12, the cancellation agreement.

The Court: That is all.

Redirect Examination

By Mr. Mackay:

Q. Now, Mr. Dunlap, I think on cross-examination you were asked why you did not file an answer to the injunction suit. Do you have an explanation to make of that now?

A. Yes. We wanted—I had dictated a revision of the complaint as a cross-complaint, and I had dictated an answer to the injunction action, or injunction suit. Before that dictation could be transcribed—it was only two days—as a matter of fact, it was only one day, because Thangsgiving was on a Thursday and our settlement conference took place on Friday—I believe the 27th was Friday—so there was only one day, actually one business day, between the service of the complaint and the reopening of the negotiations, and the negotiations were concluded the following morning.

Q. Now, I will ask you one more question, Mr. Dunlap. [373] I think you stated on direct examination that you made an offer to purchase the business of The Vita-Food Corporation.

A. That is correct.

Q. What did they say with respect to that?

(Testimony of Robert H. Dunlap.)

A. They said the business was not for sale, they had nothing for sale.

Mr. Maiden: Mr. Dunlap—

Mr. Mackay: May I ask one further question?

Q. (By Mr. Mackay): Prior to the contract of November 28, 1942, did you prepare any document or any application for cancellation of trade-mark?

A. I did.

Q. Will you examine this instrument and tell me whether that is the document you refer to?

A. That is correct.

Q. Did you file this with the Patent Office?

A. We did not because the settlement—it got out of the contract—we concluded our settlement and it got out of the contract before we filed it.

Mr. Mackay: If your Honor please, I should like to offer this in evidence.

The Court: I don't quite understand this, Mr. Mackay.

Mr. Mackay: This is merely an application [374] for cancellation of trade-mark, which was prepared but not filed. It just had something to do with that.

The Court: The cancellation of "the Stuart formula"?

Mr. Mackay: "The Stuart formula" trade-mark.

The Court: Prepared by whom?

Mr. Makay: Mr. Dunlap, on behalf of The Stuart Company.

The Court: About when was this supposed to have been prepared?

(Testimony of Robert H. Dunlap.)

The Witness: October, 1942. You will notice the date on the second page.

The Court: What is your idea in preparing it?

The Witness: This, your Honor: Our proposed complaint in the State of California would result in a decree adjudicating that we were the owner of the trade-mark. Registration is merely prima facie evidence of the ownership. The California decree would not clear the record in the Patent Office. Therefore it was necessary, in my opinion, to clear the record in the Patent Office as well as to get the decree of the California court rescinding the contract on the ground of fraud and adjudicating that The Stuart Company was and at all times had been the owner of the trade-mark after the expiration of one year from the first shipment in interstate commerce.

The Court: Did you prepare and were you going to [375] file an application for cancellation of the trade-mark with the Secretary of State of California?

The Witness: I had not prepared that, your Honor. I was going to do that also, but that would probably not have been necessary, because a favorable decree in the State court, a certified copy of that lodged with the Secretary of State of California would be recognized by the Secretary of State but not by the Commissioner of Patents.

Mr. Maiden: May I see that a moment?

The Court: That is the State Commissioner of Patents?

(Testimony of Robert H. Dunlap.)

The Witness: The Secretary of State, your Honor.

The Court: The Secretary of State, but not by the Commissioner of Patents. What Commissioner of Patents?

The Witness: The United States Commissioner of Patents. If I may, I will illustrate the point, your Honor. Your Honor will notice that there is, both in Exhibit P and Exhibit O, a reference to good will, to the good will of the business in connection with which the trade-mark had been used. The Commissioner will not accept an assignment unless good will is in there, for the reason that you cannot assign a trade-mark unless you assign it in connection with good will. You can't assign a trade-mark in gross, it isn't that kind of property.

Mr. Maiden: If the Court please, I doubt [376] the admissibility of this exhibit on several grounds. It is admitted it was never filed. It could be considered to be in the nature of a self-serving declaration, but I believe that it wouldn't be remiss if the Court received it in evidence, and I am not going to object to it, but I can see some grounds that would probably make this inadmissible.

The Court: It is received as Exhibit No. 17.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 17.)

Mr. Mackay: Now, I have one more question and that is all.

Q. (By Mr. Mackay): Mr. Dunlap, you were asked by counsel, if you were not tax-conscious, and

(Testimony of Robert H. Dunlap.)

I think in effect he asked if you had not drafted this contract in such a way as to help you in taxes. I will ask you if this agreement was drawn with the idea of reflecting the real intent of the parties in settling the disputes and the cancellation of the contract as referred to therein.

A. Exactly, exactly in accordance with our intentions. May I amplify that, Mr. Mackay?

Q. Yes.

A. If I wanted to paint a picture for tax purposes, it would have been a very simple thing for tax purposes to put a value of \$5,000.00 or \$10,000.00 on the assignment of the [377] trade-mark.

Recross-Examination

By Mr. Maiden:

Q. That is, if that had been agreeable with Vita-Food Corporation. You would have had to obtain their agreement to such a document, wouldn't you, Mr. Dunlap?

A. I haven't the slightest doubt in the world it would have been entirely acceptable. What they were interested in was \$200,000.00.

Q. In other words, the Vita-Food Corporation would have signed any type of agreement that you had written up and drafted for the purposes set forth in the agreement?

A. Any type—I wouldn't say that. If I put in there—for instance, if I put this on the basis that they had admitted they had been guilty of a

(Testimony of Robert H. Dunlap.)

fraudulent representation and the contract was therefore cancelled, I don't think they would have signed that, no. I am using that as an illustration.

Q. Well, how many drafts of this agreement of November 28, 1942, were actually prepared before you arrived at your final document?

A. I think it was written and rewritten all night long. I think we had at least four different variations.

Q. Well, why was it necessary to have so many variations of the agreement if anything you drafted would be [378] satisfactory to Vita-Food representatives?

A. For this reason: The principal discussion was as to tying Mr. Hanisch up until October 15, 1946, prohibiting him from selling any of his stock, prohibiting him from doing any other business, of agreeing to devote his attention exclusively to the actions of this company. That was what we were arguing about mostly.

Q. Now, isn't it a fact that in these discussions the substance of the transaction was that Vita-Food was selling you a trade-mark and that the entire consideration set forth in the agreement was for the purpose of acquiring that trade-mark from Vita-Food?

A. That statement is absolutely contrary to what the substance was. Let me amplify that. You will notice that attached to Exhibit 15 is the notice of cancellation of contract dated October 8th. You

(Testimony of Robert H. Dunlap.)

will notice on October 12th we acknowledged notice of termination of contract——

Mr. Maiden: Now, just a minute. I don't want this answer because he is arguing the case. He is taking facts and putting them together and drawing inferences from them, and I don't want the answer, and move it be stricken.

The Court: The part is stricken beginning with the witness' statement, "Let me amplify my answer."

Mr. Maiden: I believe that is all, if the Court please. [379]

Mr. Mackay: I think that is all.

The Court: You may step down.

(Witness excused.)